

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1028

UNITED STATES OF AMERICA, PETITIONER

v.

DIMAS CAMPOS-SERRANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Docket entries	2
The indictment	9
Motion to dismiss the indictment	10
Motion to suppress alien registration card and statements	12
Transcripts of hearing on motions to dismiss	14
Transcript of trial and Government Exhibits 1 and 2 (in part)	16
Order allowing appeal in forma pauperis	122
Opinion of the court of appeals	124
Judgment of the court of appeals	130
Order of the court of appeals denying a petition for rehearing and suggestion for rehearing en banc	130
Order of the Supreme Court granting certiorari	131

(1)

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE LYNCH

USCR 7920

17645

D.C. Form No. 101 Rev.

TITLE OF CASE

THE UNITED STATES

ATTORNEYS

For U.S.:

Thomas A. Foran, U.S. Atty
D.R. Mackenzie, Asst.

D DIMAS CAMPOS-SERPANO
a/k/a DIMAS VARGAS-GARCIA

For Defendant:
John J. Cleary
1155 E. 60th St.

STATISTICAL RECORD	U.S.TS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed	Marshal					
Violation	Docket fee					
Title						
Sec.						

DATE	PROCEEDINGS
	<p>VIOLATION: Possession of forged and counterfeited alien registration receipt card Sec. 1546, T. 18, U. S. C. - 1 count U.S.C.A. - 7th U. S. Ct.</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> <p>FILED MAY 23 1964 KENNETH J. CARRICK Clark</p> </div>

DATE	PROCEEDINGS
12-5-68	Filed Indictment (JS2)
12-5-68	Filed Designation
12-5-68	Order indictment returned in open court, bench warrant to issue and bond fixed at \$2,500.00 - Campbell, J.
12-5-68	Issued bench warrant with copy of indictment to U.S. Marshal
12-10-68	Filed bench warrant returned executed. ca
12-16-68	Attorney Hohn Cleary appointed to represent defendant. Plea of not guilty entered. Cause continued to January 6, 1969 for trial before Judge Lynch. On motion of defendant bond reduced to \$1,000.00. - Austin, J. ca
	Mailed notices 12-17-68
1/6/69	Order leave to defendant to file motions by January 14, 1969 and cause continued to January 16, 1969, 4:30pm for status report and to set for trial. Lynch, J. ca
	Mailed notice 1/7/69
1-6-69	Filed order appointing counsel for defendant - John J. Cleary
1-13-69	Filed 3 motions, to dismiss, suppress & suppress confessions & statements
1-16-69	Order leave to the government to file brief in reply to the defendant's motions within one week. Cause continued to Jan. 29, 1969 at 10 A.M. for decision on the motions. - Lynch, J. ca
	Mailed notices 1-20-69
1-23-69	Filed Government's answer to the motion of the defendant Dimas Campos-Serrano to dismiss the indictment.
1-23-69	Filed Government's answer to defendant's motion to suppress confession and statements.
1-23-69	Filed Government's answer to defendant's motion to suppress. ca
1-29-69	Order motion of defendant to dismiss denied. Motions to suppress evidence set for hearing Monday February 3, 1969 2:00 P.M. Leave to Government to amend his answers to the motions to suppress. - Lynch, J. ca
	Mailed notices 1-30-69
1-3-69	Filed memorandum in support of Government's answer to defendant's motion to suppress and to defendant's motion to suppress confession and statements ca
2-4-69	Evidence heard on defendant's motions to suppress evidence and continued to February 5, 1969 2:00 P.M. for arguments. - Lynch, J. ca
	Mailed notices 2-6-69
2-6-69	Further evidence heard and concluded. Arguments heard. Order motion to suppress evidence of the Alien Registration Card denied. On the question of the defendant's confession and admissions on the car. the motion is granted. The defendant's motion to dismiss is denied. Cause set for trial March 24, 1969 10:00 A.M. - Lynch, J. ca
	Mailed notices 2-7-69

CONTINUED

DIKAS CAMPOS-SERRANO

68 CR 732

-2-

DATE	PROCEEDINGS
2-24-69	Order cause continued to March 3, 1969 10:00 A.M. for trial. - Lynch, J. Mailed notices 2-25-69
3-3-69	Order cause continued to March 4, 1969 10:00 A.M. for trial. - Lynch, J. Mailed notices 3-4-69
3-4-69	Cause called for trial. Evidence heard. Government rests. Motion defendant for judgment of acquittal at close of Government's case denied. Defendant rests. Motion of defendant for judgment of acquittal at close of all evidence denied. The Court finds the defendant guilty as charged in the indictment. Order defendant committed to the Attorney General of the United States for a period of three (3) years. Execution of Sentence suspended and defendant placed on probation to the Chief Probation Officer of this court for a period of three (3) years, on condition that he return to Mexico and not return to United States illegally. Defendant remanded to the Immigration and Naturalization Service for disposition in accord with this order of deportation entered November 22, 1968. Motion of defendant for new trial and in arrest of judgment overruled. Motion of defendant for leave to appeal in forma pauperis denied as frivolous. - Lynch, J. DRAFT Mailed notices 3-5-69
3-4-69	Filed Motion for leave to proceed in forma pauperis on appeal
3-4-69	Filed Defendant's notice of appeal. \$5pdca
3-5-69	Mailed certified copy of Order entered March 4, 1969, copy of notice of appeal and docket entries to the U. S. C. A. 7th Circuit
3-6-69	Issued 3 certified copies of Judgment and commitment to the U. S. Probation Office.
3-5-69	Filed waiver of trial by jury
3-5-69	Waiver of Jury trial executed and approved in open Court. - - Lynch, J.
3-7-69	Mailed notices 3-7-69
4-9-69	Filed certified copy of order entered on April 7, 1969 by the U. S. C. A. 7th Circuit granting defendant leave to proceed on appeal in forma pauperis, and further directing the official Court reporter to prepare transcript of proceedings without costs to defendant, costs to be paid by the administrative office of the U. S. Courts.
4-9-69	Issued 2 certified copies of order entered April 7, 1969 to the official Court reporter.
4-17-69	Filed certified copy of order entered by the U. S. Court of Appeals on April 15, 1969 extending time in which to complete record on appeal.
5-1-69	Filed certified corrected copy of order entered by the U. S. C. A. 7th Circuit on April 7, 1969 granting defendant leave to proceed in forma pauperis, directing Official Court Reporter to transcribe all pretrial, trial and post trial proceedings at no

CONT

DATE	PROCEEDINGS
	cost to the defendant and further ordering the Clerk of the U. S. District Court to transmit to U. S. Court of Appeals, appointing John J. Cleary as attorney for defendant and waiving the printing of the Appendix and granting leave to file twelve 12 typewritten copies of brief for petitioner appellant with one copy to respondent-appellee
5-22-69	Filed Clerk's File Copy of Transcript of Proceedings had before the Honorable William J. Lynch, Judge on February 4, 6 and March 4, 1969 filed by the official Court Reporter (3 volumes)

CERTIFIED COPY (Rev. April 1968)

United States of America
NORTHERN DISTRICT OF ILLINOIS

17645

I, ELBERT A. WAGNER, JR. Clerk of the United States District Court
for the NORTHERN District of ILLINOIS, do hereby certify that the annexed
and foregoing is a true and full copy of the original docket entries in the cause entitled
UNITED STATES OF AMERICA vs. DIMAS CAMPOS SERRANO 68 CR 732.

now remaining among the records of the said Court in my office.

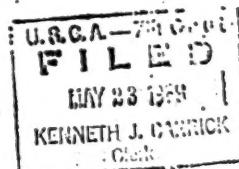
IN TESTIMONY WHEREOF, I have hereunto subscribed my name and
affixed the seal of the aforesaid Court at

this 23rd day of MAY A. D. 19 69

ELBERT A. WAGNER, JR.

Clerk

By Charles A. Anderson
Deputy Clerk.



JUDGE LYNCH DOCKETED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

686R 732 FILED

UNITED STATES OF AMERICA

vs.

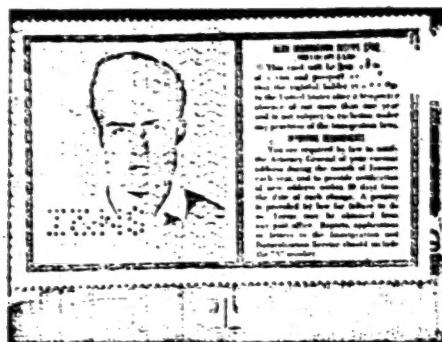
DIMAS CAMPOS-SERRANO
a/k/a DIMAS VARGAS-GARCIA

No.

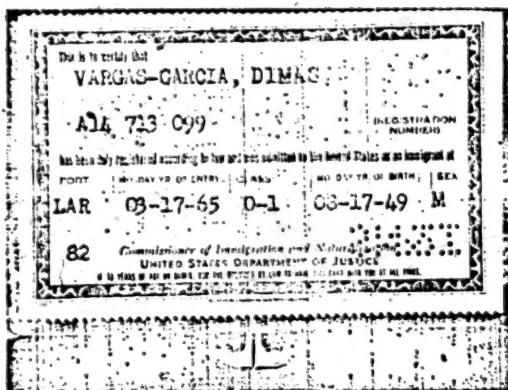
Violation: Title 18, United
States Code, Section 1416
U.S.A.

17 DEC 5 PM 3 10

The DECEMBER 1968 GRAND JURY charges:

That on or about November 19, 1968, at Chicago, in the Northern
District of Illinois, Eastern Division,DIMAS CAMPOS-SERRANO
a/k/a DIMAS VARGAS-GARCIAdefendant herein, knowingly and intentionally possessed a falsely made,
altered, forged and counterfeited alien registration receipt card, a
document required for entry into the United States, of the tenor and
description, as follows:

(FRONT)



(REAR)

and the defendant then knew that the said alien registration receipt card was falsely made, altered, forged and counterfeited; in violation of Title 18, United States Code, Section 1546.

A TRUE BILL:

Edgar F. Feindtag
FOREMAN

Marian A. Phen
UNITED STATES ATTORNEY

DRM:mls

Form DJ-15
(Ed. 2-7-64)

No. 1982

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

EASTERN Division

THE UNITED STATES OF AMERICA

vs.
DINAS CAMPOS-SERRANO a/k/a

DINAS VARGAS-GARCIA

INDICTMENT

T. 18, U.S.C. § 1546

At great peril,

Elgar F. Feinberg

Filed in open court this 5th day

of December, D. M. 68

Elliott A. Nagorski

Deputy Clerk

670 902-012

FILED

DEC 5 PM 3 10

U. S. CLERK
DISTRICT COURT

Docketed

[Filed Jan. 13, 1969, at — o'clock —]

Elbert A. Wagner, Jr., Clerk.]

No. 68 CR 732

UNITED STATES OF AMERICA, PLAINTIFF

v.

DIMAS CAMPOS-SERRANO, DEFENDANT

Motion To Dismiss

The defendant DIMAS CAMPOS-SERRANO, through his appointed counsel, moves to dismiss the indictment.

1. The defendant moves to dismiss the indictment for failure to state an offense and the improper application of the statute (18 U.S.C. 1546) to the Alien Registration Receipt Card (Form I-151). The statute 18 U.S.C. 1546 penalizes the possession of "any immigrant or non-immigrant visa, permit, or other document required for entry into the United States." By its own regulations, the Immigration and Naturalization Service has characterized the Alien Registration Receipt Card (Form I-151) as *evidence of registration*. 8 C.F.R. 264.1 (Jan 68). Also, to treat the possession of an allegedly altered or forged Alien Registration Receipt Card as a violation of 18 U.S.C. 1546 nullifies other statutes regulating the improper entry of aliens into the United States. In 8 U.S.C. 1325 any alien who obtains entry to the United States by wilfully false or misleading representation shall, for the first commission of any such offense, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months or by a fine of not more than five hundred dollars or by both. In 8 U.S.C. 1306(d) there is a penalty provision for the counterfeiting of an Alien Registration Receipt Card. This card should be more properly considered as evidence of lawful admission into the United States consummated after entrance, and therefore would not be qualified as a document required for entry. If there is any well-founded doubt, it should be

resolved in favor of the defendant against a felony violation of 18 U.S.C. 1546. See *McFarland v. United States*, 19 F. 2d 807 (6th Cir. 1927), involving this same statute. In 18 U.S.C. 1546 the statute is directed at those persons using false documents to bring about their lawful initial entrance into the United States, and the statute has no application to a document whose primary purpose is to acknowledge the registration of an immigrant and to secondarily identify him for purposes of *reentry*. For a case discussing the distinction between original entry and reentry, see *Lau Ow Bew v. United States*, 144 U.S. 47 (1892).

2. The defendant claims under the equal protection clause and due process clause of the Fourteenth Amendment and the speedy trial provision of the Sixth Amendment, that he will be unduly prejudiced by the delay in the return of the indictment against him. The defendant was arrested in Chicago, Illinois, on 19 November 1968 for the offense now charged and has remained continuously in confinement. The indictment in this case was returned on 10 December 1968, and counsel for the defendant was first appointed on 16 December 1968. At the time the defendant was arrested certain material witnesses were arrested with him, and since that time they have been deported to Mexico. Without access to these witnesses and the use of their testimony, he will be deprived of the opportunity to obtain a full hearing on certain motions filed in this case asserting violations of his constitutional rights. The defendant plans to make every effort to locate and obtain testimony of these witnesses, but if he is deprived of their testimony, it will have been the unnecessary delay in furnishing him with counsel and bringing this case on for trial. For the reason of the violation of his constitutional rights and appeal to the discretion of the court under Rule 48(b), Federal Rules of Criminal Procedure, the defendant requests that this indictment be dismissed.

3. That the defendant was arrested in his apartment on 19 November 1968 for the charged offense, and at the same time other persons for whom the same or similar charges could have been brought were also arrested by federal agents of the Immigration and Naturalization Service. That the selection of Dimas Campos-Serrano for prosecution of this felony offense was an arbitrary and a discriminatory act of the federal law enforcement agency which denied the defendant his right as

a person under the Fifth Amendment to the due process in the fair and impartial enforcement of federal laws.

For the above reasons, the defendant moves to dismiss the indictment with prejudice.

Respectfully submitted,

Dated 13 January 1969.

John J. Cleary,

JOHN J. CLEARY,

Attorney for Defendant, 1155 East 60th Street,
Chicago, Illinois 60637. 684-2727.

Docketed

[Filed Jan. 13, 1969, at — o'clock —]

Elbert A. Wagner, Jr., Clerk.]

In the United States District Court, Northern District of Illinois, Eastern Division

No. 68 CR 732

UNITED STATES OF AMERICA, PLAINTIFF

v.

DIMAS CAMPOS-SERRANO, DEFENDANT

Motion To Suppress

The defendant, DIMAS CAMPOS-SERRANO, through appointed counsel, now moves to suppress all evidence (including but not limited to the alien registration card with No. A14 718 099 and all written and oral statements of the defendant) consequent to his unlawful arrest by agents of the Immigration and Naturalization Service on 19 November 1968 in Chicago, Illinois.

1. It is alleged in support of this motion to suppress evidence that two agents of the Immigration and Naturalization Service on 19 November 1968 in the early morning hours arrested Miguel Rico at his place of work, and these federal agents directed Miguel Rico to return to his apartment to secure his clothing because he was being taken to a place of confinement. Miguel Rico had allegedly been illegally working at the Rulon

Company, at West Carol Street and Ashland Avenue in Chicago.

2. With their prisoner Miguel Rico these two federal agents entered the apartment where the defendant Campos-Serrano was lawfully residing at 2251 S. California on the second floor, front.

3. These agents conducted a search of the premises for other persons and examined the contents of dressers, drawers, and closets.

4. That the defendant Campos-Serrano was present in the apartment when the agents arrived and that neither he nor Miguel Rico gave any consent to their entrance into the apartment at his time.

5. That one of the two agents demanded the identification of the defendant Campos-Serrano who in response to this demand produced the alien registration receipt card which is now the subject of this indictment.

6. That after examining the identification one or both of these federal agents left the apartment but later returned and advised the defendant that the card he had in his possession which had previously been shown to them was false.

7. That these agents failed to advise the defendant Campos-Serrano of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and further did not explain that presentation of this document would again incriminate in violation of his rights under the Fifth Amendment.

8. That after an extensive discussion involving penetrating examination by these agents, the defendant acknowledged that the alien registration receipt card was false.

9. That at that time he was taken into custody with other persons who had been arrested at this building.

10. That on the following day, 20 November 1968, he appeared before an Immigration and Naturalization Service hearing officer and was, for the first time, then advised of his constitutional rights at the time he made this written statement, but that his written statement was nothing other than the product of the first illegal statement, and that he was not advised that his oral incriminating statement to the agents on 19 November 1968 was totally incompetent, inadmissible evidence and could not be used against him.

11. That the defendant has no criminal record and is unaware

of criminal procedures, and further that defendant is unable to speak the English language.

Therefore, pursuant to Rule 41, Federal Rules of Criminal Procedure, the defendant moves to suppress all evidence flowing from the unlawful search without a warrant of the apartment at 2251 S. California, Chicago, Illinois, and also moves to suppress this evidence on the basis that the arrest was made without probable cause, all in violation of the defendant's rights under the Fourth Amendment, United States Constitution.

Dated: 13 January 1969.

Respectfully submitted,

JOHN J. CLEARY,
Attorney for Defendant,
1155 East 60th Street,
Chicago, Illinois 60637. 684-2727.

Docketed

[Filed Jan. 13, 1969, at — o'clock —, Elbert A. Wagner, Jr.,
Clerk.]

In the United States District Court, Northern District of
Illinois, Eastern Division

No. 68 CR 732

UNITED STATES OF AMERICA, PLAINTIFF

v.

DIMAS CAMPOS-SERRANO, DEFENDANT

Motion To Suppress Confession and Statements

The defendant through his appointed counsel, moves to suppress all oral incriminating statements and written confessions or incriminating statements made by the defendant CAMPOS-SERRANO in the investigation of this case.

In support of this motion the defendant alleges:

1. The defendant DIMAS CACPOS-SERRANO, who speaks only Spanish, was on 19 December 1968 in his apartment at 2251 S. California, Chicago, Illinois, interrogated and questioned concerning a fraudulent immigration document without having been properly advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966);

2. That he did not intelligently, voluntarily, and understandingly waive his right to remain silent or the right to have the assistance of appointed counsel during the interrogation;
3. That at the time of the interrogation these federal agents had substantially deprived the defendant Campos-Serrano of his liberty;
4. That these agents secured from the defendant Campos-Serrano at the time of his arrest and after their interrogation an incriminating statement concerning the possession of this allegedly fraudulent immigration document;
5. That on 20 November 1968 the defendant Campos-Serrano executed a written statement or confession but was for the first time advised of his constitutional right to remain silent and have the assistance of appointed counsel during the interrogation at that time;
6. That the defendant Campos-Serrano speaks only Spanish and that the above statement secured from him was in Spanish;
7. That the written statement executed on 20 September 1968 by the defendant Campos-Serrano was a direct product and consequence of his prior oral admission or statements, which had become tainted and thereby inadmissible as a result of the failure to give the proper warning prior to the procuring of the first oral statement;
8. That the production of the alien registration receipt card to the federal agents of the Immigration and Naturalization service on 19 November 1968 in response to their direct questioning constituted testimonial evidence, which is protected by the Fifth Amendment, and for their failure to advise the defendant of his Fifth Amendment rights in the production of that identification card, the suppression of the card is required;
9. The defendant Dimas Campos-Serrano was arrested in the early morning hours of 19 November 1968 a Sunday, and on Monday was examined before an Immigration and Naturalization Service investigator, J. T. McLennan, concerning the present offense, a felony violation of 18 U.S.C. 1546, but at no time was he brought before the United States Commissioner on this federal felony charge. His first court appearance, where he first obtained the assistance of counsel, was on 16 December 1968 before the Honorable Richard B. Austin at which time the defendant entered a plea of not guilty. Both Rule 5(a), Federal Rules of Criminal Procedure, and 18 U.S.C. 1357(a)(4) direct that the person arrested for a felony offense shall be taken with-

out unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. The statement made by the defendant Campos-Serrano during this period of unreasonable delay deprived the defendant of the effective assistance of counsel at a time when it would have been most helpful and violated the procedures set down for administration of these criminal offenses. The duty for bringing this defendant immediately before a judicial officer has been set forth in *United States v. Valente*, 155 F. Supp. 577 (D.C. Mass. 1957), which held:

If the arrest is "for felonies" the usual obligation to proceed without delay before a committing magistrate applies. Sec. 1357(a)(4). The mere fact that the officer could properly examine as to status did not give him a roving commission. His examination of the defendant on the subject of a felony without attempting to comply with Rule 5(a), and the introduction of the resultant (confession) at a subsequent criminal trial, was a flagrant disregard of defendant's rights. 155 F. Supp. 577, 579.

For the above reasons, the defendant moves to suppress all oral and written statements of the defendant Campos-Serrano in this proceeding.

Respectfully submitted,
Dated: 13 January 1969.

JOHN J. CLEARY,
Attorney for Defendant, 1155 East 60th Street,
Chicago, Illinois 60637. 684-2727.

1 In the United States District Court, Northern District
of Illinois, Eastern Division

No. 68 CR 732

UNITED STATES OF AMERICA

vs.

DIMAS CAMPOS-SERRANO, DEFENDANT

Transcript of proceedings had in the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the

judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, February 4, 1969, at the hour of 2:00 o'clock p.m.

Present: Hon. Thomas A. Foran, United States Attorney, by Mr. D. J. Mackenzie, Assistant U.S. Attorney, on behalf of the Government; Mr. John J. Cleary, on behalf of the defendant.

Also present: Mrs. L. W. Hurney, District Director, Immigration and Naturalization Service.

2 The CLERK: *United States v. Dimas Campos-Serrano, 68 CR 732.*

Mr. MACKENZIE: Your Honor, the Government is ready to proceed.

The COURT: Very well.

Mr. CLEARY: Good afternoon, your Honor. I would like to beg the indulgence of the Court. My interpreter has not yet arrived.

The COURT: Very well, we will wait for him.

Mr. CLEARY: The point is I think we can start the hearing without the interpreter.

The COURT: Does the defendant understand English?

Mr. CLEARY: No, he does not. He understands only Spanish.

Mr. MACKENZIE: Your Honor, the Government does have an interpreter present in the courtroom. It was our intent, though, to call this individual as a witness in the case.

The COURT: He will not be able to interpret for the defendant.

Mr. CLEARY: Right, I need someone other than the INS personnel. I just was on the telephone now trying to

3 locate someone. I was promised someone would be here.

They had someone here yesterday for me. It is the Urban Progress Center at 1900 West Division.

The COURT. Does he understand any English?

Mr. CLEARY. No, and my Spanish is terrible. I was thinking possibly, your Honor, and I think I could speak for the defendant, I could relate any event that has to be related to him, if we could at least start the hearing to get the background—

The COURT. All right, let's proceed then.

Mr. MACKENZIE. As long as we are proceeding on that representation the Government has no objection.

The COURT. All right, proceed.

Mr. CLEARY. At this time, your Honor, I would like to call Agent Jacobs from the Immigration and Naturalization Service.

Harold E. Jacobs, called as an adverse witness herein by the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. CLEARY:

Q. Would you state your name for the record,
4 please.

A. Harold E. Jacobs.

Q. How do you spell your last name, for the record, please?

A. J-a-c-o-b-s.

Q. What is your business or occupation, sir?

A. I am an investigator.

Q. For whom, sir?

A. The United States Immigration and Naturalization Service.

Q. When were you first employed by that organization?

A. In March 1960.

Q. Were you in that capacity on 19 November 1968?

A. I was.

Q. Had you ever heard of a person by the name of Miguel Rico?

A. I have.

Q. When did you first learn of this person?

A. When he was arrested at his place of employment.

Q. Do you know who arrested Miguel Rico at his place of employment?

5 A. I do not know. There were several of us.

Q. Do you know who arrested Miguel Rico at his place of employment?

A. I do not know. There were several of us.

Q. Did you arrest Miguel Rico?

A. I don't know whether I did personally or not.

Q. Do you know what day Miguel Rico was arrested on?

A. I don't remember—it was November 19, yes, 1968.

Q. Do you have any records in your possession that might assist you in refreshing your recollection to determine whether or not you were the agent that arrested Miguel Rico?

A. No, sir, I do not.

Q. Had you ever made any writings or reports concerning the arrest of Miguel Rico?

A. No, I didn't.

Mr. CLEARY. At this time, your Honor, I would ask permission to excuse this witness and call another, with the right of recall if I can determine he is one of the arresting agents.

6 The COURT. Any objection?

Mr. MACKENZIE. May I have one second, your Honor?

The COURT. Yes.

By Mr. CLEARY:

Q. Are you familiar with what is called a task force arrest?

A. Yes, I am.

Q. Would you tell the Court what a task force arrest is?

A. That involves, your Honor, several investigators that are—that go to a particular area to make several arrests.

Q. When are these task force arrests planned? Is there any prior planning involved?

A. Yes, usually the day before.

Q. And what type of plans or preparations are made?

A. Well, the preparations are such that according to the information that has been received—that usually determines the number of officers that will be needed.

7 Q. And by information that you would receive, you would receive, for example, names of certain possible violators of immigration laws, is that not correct?

A. That's correct.

Q. What type of information would you receive about these violators?

Mr. MACKENZIE. Your Honor, I fail to see the relevancy of this line of questioning to the defendant in this case.

The COURT. Is it an attempt to be able to get this witness to be able to identify the defendant here?

Mr. CLEARY. I am trying to get the procedure because I believe that the arrests for which this defendant was a product of, was a task force arrest, and I think I have a right to go into the procedure or planning surrounding a task force arrest.

The COURT. Well, I don't see the relevancy of it, but I will let you proceed with it at the moment.

Your objection is overruled.

By Mr. CLEARY:

Q. What type of transportation equipment do you use?

A. We have cars, automobiles.

8 The COURT. Of course you might go with it—was he present when the defendant was arrested.

Mr. CLEARY. He doesn't remember, your Honor.

The COURT. You don't remember that?

The WITNESS. I was present when he was arrested, yes, sir.

The COURT. You see, I used the other question. You used the one, did he make the arrest, but was he present when the defendant was arrested.

Mr. CLEARY. Thank you, your Honor.

The COURT. All right.

By Mr. CLEARY:

Q. You say you were present when the defendant was arrested.

Was this a task-force arrest at that time?

Mr. MACKENZIE. Your Honor, the question that was originally presented to the witness was, was he present when Miguel Rico was arrested.

9 Mr. CLEARY. Yes.

The COURT. Yes.

Mr. MACKENZIE. Well, did he arrest Miguel Rico? Miguel Rico is not the defendant in this case.

The COURT. I beg your pardon. Strike it from the record and you may begin again.

Mr. CLEARY. All right, your Honor.

By Mr. CLEARY:

Q. You do not know whether or not you were present when Miguel Rico was arrested, is that not correct?

A. I was present at the location, yes.

Q. Do you know where Miguel Rico was arrested?

A. I can't recall exactly.

Q. Do you remember if it was his place of employment?

A. It was his place of employment, yes.

Q. To your knowledge now you were present when he was arrested?

A. Yes, I was.

The COURT. Just a moment, Mr. Cleary. Will you come up here?

Mr. District Attorney, will you come too?

10 (The following proceedings were had at the side bar, out of the hearing of the witness:)

The COURT. Mr. Clearly, you have an important telephone

call. I believe it is your interpreter. You can take it in my chambers.

Mr. CLEARY. Thank you very much, your Honor.

(A short recess was taken, after which the following proceedings were had in open court, in the presence and hearing of the witness.)

Mr. CLEARY. Thank you, your Honor, My interpreter is on the way.

The COURT. All right, you may proceed.

By Mr. CLEARY:

Q. To the best of your recollection, Miguel Rico was arrested at his place of employment, is that not correct?

A. Yes.

Q. That is somewhere here in the City of Chicago?

11 A. Yes.

Q. Do you have any idea where in the City of Chicago?

A. It was at the Roulon Corporation.

Q. The Roulon Corporation?

A. Yes.

Q. And was this arrest of Miguel Rico part of a task force arrest?

A. It was.

Q. Do you have any idea or recollection of the number of people scheduled to be arrested on that day?

A. No.

Mr. MACKENZIE. Your Honor, I object to that question also.

The COURT. Let me have it, please, Mr. Reporter.

(The last question and answer were read by the reporter.)

The COURT. Yes?

Mr. MACKENZIE. I object, your Honor, to the question, does he have any idea of the number of individuals scheduled to be arrested.

The COURT. Sustained.

12 By Mr. CLEARY:

Q. Do you have any idea as to the number of individuals arrested on that date?

A. I can only give an estimate.

Q. Your estimate, please, sir.

A. I would say fifteen or sixteen.

Q. Fifteen or sixteen?

A. Yes.

Q. Do you remember in which order Mr. Miguel Rico was?

A. No, I do not.

Q. Do you remember the time of day which he was arrested?

A. Approximately 8:00 o'clock in the morning, a.m.

Q. Now, do you remember possibly the other agents who were present at the time he was arrested?

A. Yes.

Q. What are the names of those agents?

A. Adolphus B. White, Jr., Clark Burrow—

Q. What was that last name?

A. Burrow.

Mr. MACKENZIE. Will you raise your voice just a little bit, please?

13 The COURT. Yes, please.

Al White, and the next one please.

Mr. CLEARY. It was Burrow, I believe.

By The WITNESS:

A. —Clark Burrow, John McLennan, Paul—excuse me, Gene Lewis, Bruce Peterson, Bruce Ferguson and John Coulson.

By Mr. CLEARY:

Q. To your knowledge how many of these agents were present at the scene of arrest of Miguel Rico?

A. All of them.

Q. Including yourself that would be six agents?

A. I believe—I must have left one out. There should have been eight.

Q. Eight agents?

A. Yes.

Q. Did you have an arrest warrant for Miguel Rico?

A. We did not.

Q. Would you describe the arrest of Miguel Rico to the Court?

A. I cannot.

Q. Do you remember—

14 The COURT. Yes, counselor?

Mr. MACKENZIE. Your Honor, I still fail to see the relevancy of this line of questioning.

The COURT. I cannot see it.

Mr. CLEARY. If your Honor would allow, I can just possibly point it out.

The COURT. I will allow it, but I cannot see the relevancy.

Mr. CLEARY. The relevancy is that the INS agent arrested Miguel Rico.

The COURT. Well, he doesn't know anything about it.

Mr. CLEARY. No, but the point is I am just trying to find out what were the possibilities. Thereafter Miguel Rico was transported back to his apartment and at that apartment, after gaining entry, presumably through Miguel Rico, they arrested the defendant in this case.

Now, I have to understand under what context Miguel Rico was arrested in order to determine the search of the premises of this defendant.

The COURT. You can do so, if you have got the 15 right agent.

Mr. CLEARY. Well, I am trying to establish that.

The COURT. All right, go ahead with it.

By Mr. CLEARY:

Q. After the arrest of Miguel Rico do you know what you or the other agents did with Miguel Rico?

A. He was taken to his residence.

Q. At that time?

A. Soon after.

Q. At any time did any of those agents or yourself secure a search warrant?

A. No.

Q. Were you one of the agents that entered his premises?

A. I was.

Q. About what time did the defendant—did Miguel Rico and the immigration agents enter his apartment?

A. I can't recall exactly. Perhaps 8:45 a.m.

Q. Do you remember where his apartment was located?

A. I can't give an exact address.

16. Q. Just approximately.

A. Well, he lives on the South Side. I don't recall the exact address.

Q. Would you describe the building?

A. It was an apartment building.

Q. And where was the apartment of Miguel Rico located?

A. On the first floor.

Q. On the first floor. How many agents entered with Miguel Rico?

A. Two.

Q. Another agent besides yourself?

A. That is right.

Q. What was his name?

A. Clark Burrow.

Q. Who entered the apartment first, Miguel Rico or the immigration agent?

A. Miguel Rico.

Q. Did he have to use a key to unlock the door?

A. I believe he knocked and the door was opened.

Q. Was there any response, without going into the words, to the knock, such as, "Who's there?"

A. I don't recall.

17 Q. The door was opened. Do you know by whom?

A. By another individual.

Q. Do you know that other individual?

A. Yes, I do.

Q. Do you know him by name?

A. Yes, I do.

Q. What is his name?

A. He's—it's Mr. Campos.

Q. Do you see that individual in court?

A. I do.

Q. Did Miguel Rico enter the apartment?

A. He did.

Q. Did you and the other agent enter the apartment?

A. We did.

Q. Would you describe your activities upon immediately entering the apartment?

A. Miguel Rico proceeded to gather his things, his property, his clothing.

Investigator Burrow watched him do this and I talked to Mr. Campos.

Q. Did at any time you or Agent Burrow—

The COURT. Just a moment, come up here.

This is off the record.

18 (Here followed a discussion had off the record.)

The COURT. This court will take a brief recess.

(A short recess was taken.)

Mr. CLEARY. Your Honor, my interpreter is now present.

The COURT. Very well, you may sit back of him there.

All right, Mr. Cleary.

Mr. CLEARY. Thank you very much, your Honor.

The COURT. Now let me have the name, for the record, of the interpreter.

The INTERPRETER. Actelina LaPorte, A-c-t-e-l-i-n-a L-a-P-o-r-t-e.

The COURT. She better be sworn, Mr. Johnson.

You understand English, do you?

The INTERPRETER. Yes, sir.

The COURT. Mr. Clerk, will you administer the usual oath?

The CLERK. From English to Spanish and Spanish to English?

19 The COURT. Yes. Raise your hand, please.

The CLERK. You do solemnly swear to interpret the oath to be administered to the defendant from the English to the Spanish language, the questions that are propounded to him from the English to the Spanish language, and his answers from the Spanish to the English, and a true interpretation to make, so help you God?

The INTERPRETER. I do.

The COURT. All right, now you may be seated. Take the last chair there.

All right, Mr. Cleary.

By Mr. CLEARY:

Q. Was there anyone else present in the apartment at the time of your entry besides yourself, the other agent, Miguel Rico and the defendant?

A. There were none that I recall.

Q. At any time did you look into the closets or drawers?

A. No.

Q. In that apartment?

A. No.

Q. At any time did Agent Burrow look into the
20 closets or drawers of that apartment?

A. No, he didn't.

Q. At any time did you or Agent Burrow ask about other tenants or persons in that apartment?

A. Not that I recall.

Mr. MACKENZIE. Your Honor, are Mr. Cleary's questions directed to the witness here, covering the actions of Mr. Burrow and the agent, or are you inquiring as to whether the agent here did the acts that you sought?

Mr. CLEARY. I think he answered my questions. I asked both what he did and what Burrow did.

The COURT. He did.

Mr. MACKENZIE. Well, I object to the answers that the witness made with respect to Agent Burrow. There is no foundation to determine whether he was able to view Mr. Burrow's actions at the time.

The COURT. Well, if he said he knew—overruled, you may proceed.

Speak up, will you please, sir, so that counsel over here will hear you.

The WITNESS. Yes, your Honor.

21 The COURT. All right.

By Mr. CLEARY:

Q. You approached the defendant in this case, is this not correct?

A. Yes, sir, I did.

Q. What did you say to him, if anything?

A. We had already identified ourselves when we entered.

Q. Was the other agent present in the capacity—well, was he present, close by at the time you interviewed this defendant?

A. Yes, he was.

Q. How did you identify yourself to this defendant?

A. I showed him my credentials and told him who I was.

Q. In what language did you speak?

A. In Spanish.

Q. What words did you use to identify yourself?

A. I told him that I was an official of the Immigration Service.

Q. What did you ask him, if anything?

A. I asked him where he was from.

22 Q. What was the reply, if anything?

A. He said Mexico.

Q. What did you ask him, if anything, at that time?

A. I asked him under what status he was in the United States.

Q. What was his reply, if any?

A. He said he was a resident alien.

Q. What did you ask him, if anything, at that time?

A. I asked him for proof.

Q. Was that the word you used, "proof"?

A. Yes.

Q. Did you have any reason to believe that he was not properly a resident of the United States?

A. At the time that I asked him for proof?

Q. Yes.

A. No.

Q. What did he do, if anything, in response to your question?

A. He produced a form which we call I-151.

Mr. CLEARY. At this time I would like the reporter to mark this as Defendant's Exhibit 1, for identification.

23 (Said document was marked Defendant's Exhibit 1, for identification.)

• By Mr. CLEARY:

Q. At this time I show you a document marked Defendant's Exhibit 1, for identification, and ask if you recognize that.

A. I do.

Q. Is that the card produced by the defendant at the time your interview took place?

A. Yes, sir, it is.

Q. Did you examine that card, sir?

A. Yes, I did.

Q. Did you copy down any information from that card?

A. I did not.

Q. Did any further questioning take place after he produced this card?

A. Yes.

Q. O.K., what questions did you ask?

A. I asked him for his Mexican passport.

Q. You asked him for his Mexican passport?

A. Yes.

Q. Did he produce a Mexican passport?

24 A. He did not.

Q. Did he give any response?

A. Yes.

Q. What did he say?

A. He said it was in Mexico.

Q. And what did you do then?

A. I asked him why it was in Mexico.

Q. And what did he say?

A. He replied that he'd sent it there because he was afraid of losing it.

Q. What did you do then?

A. I asked him for his social security card.

Q. What did he do in response?

A. He produced it.

Mr. MACKENZIE. This is the social security card.

Mr. CLEARY. At this time I would like this marked as Defendant's Exhibit 2, for identification.

(Said document was marked Defendant's Exhibit 2, for identification.)

By Mr. CLEARY:

Q. At this time, sir, I am showing you a document
25 marked Defendant's Exhibit 2, for identification.

Do you recognize it?

A. Yes, sir, I do.

Q. Is that the card that the defendant showed you?

A. Yes, it is.

Q. Did you say anything at this time in response to receiving that card?

A. Not that I recall.

Q. Did the defendant say anything after producing that card?

A. No, I don't recall anything.

Q. What did you do at that time then, sir?

A. I returned the documents to the defendant.

Q. You returned both Defendant's Exhibit 1 and Defendant's Exhibit 2 to the defendant, is that not correct?

A. No, pardon me, there is a correction. I did show the two documents to Investigator Burrow.

Q. What did he do with those documents?

A. He looked at them.

Q. Then what if anything did he do?

A. He gave them back to me.

26 Q. Then in turn you returned these to the defendant, is that not correct?

A. I did.

Q. What did you do then?

A. By this time Miguel Rico was ready to depart, so we left with Miguel Rico.

Q. Now, where did you take Miguel Rico?

A. I took him back out and put him in a vehicle.

Q. What type of vehicle did you have?

A. A two-door sedan.

Q. Did you have only one two-door sedan for eight agents?

A. No.

Q. How many vehicles did you have?

A. We had four.

Q. Was any other person present besides the agents you have heretofore enumerated?

A. No, there were not—just when do you mean, counselor?

Q. I mean at this time when you returned Miguel Rico to the vehicle, who was present at that time?

A. Investigator White.

Q. Was there anyone else present besides Investigator 27 Burrow, White, yourself and Miguel Rico?

A. There was.

Q. Who were they?

A. I don't recall their names.

Q. Were they prisoners?

A. They were.

Q. Do you remember how many there were?

A. I do not.

Q. Did any conversation take place with respect to this defendant out there in that automobile or near that vehicle?

A. In respect to the defendant?

Q. Right.

A. Yes.

Q. What happened then?

A. In respect to what, counsel?

Q. Well, what did you do then after you were out there in the car and you had Miguel Rico in the vehicle? Did you drive off? What did you do?

A. No, I was the driver of the car that I was riding—in which I was riding. Another individual was approaching us at this time, coming up the sidewalk.

28 Q. Do you know who this individual was?

The COURT. Can you hear him?

Mr. MACKENZIE. No, your Honor.

Would you speak up, Mr. Jacobs, please.

The COURT. Please.

By The WITNESS:

A. There was another individual approaching us on the sidewalk.

By Mr. CLEARY:

Q. Do you know his name?

A. I recall his last name.

Q. Ortiz Rodriguez, is that correct?

A. That's correct, counsel.

Q. What did you do, if anything, at that time?

A. I personally did nothing.

Q. Did you see any other immigration agent do anything with respect to Mr. Ortiz Rodriguez at that time?

A. I did.

Q. What agents did anything with respect to Mr. Ortiz Rodriguez, which ones?

A. Investigator White and Investigator Burrow.

Q. What did you see them do, if anything?

29 A. They talked to this other individual, talked to Mr. Ortiz.

Q. As a result of their conversation did they place Mr. Ortiz under arrest?

A. They placed him in the car in which I was riding.

Q. Presumably he was under restraint at that time, is that not correct?

A. He was.

Q. What happened then if anything?

A. Well, we warned him of his rights.

Mr. CLEARY. At this time, your Honor, I made a mistake on my part. I hope you will forgive me. I won't say I'm the most experienced, but at this time I would like to exclude any other agents who may be testifying in this matter at this time.

The COURT. Motion granted.

Very well, proceed.

By Mr. CLEARY:

Q. What happened then?

A. We questioned him.

Q. As a result of your questioning—was this in the vehicle that you questioned him?

30 A. It was.

Q. Did you question him about the type of alien registration card he might have had in his possession?

A. He had already produced this.

Mr. CLEARY. Could you mark this Defendant's Exhibit 3?

(Said document was marked Defendant's Exhibit 3, for identification.)

The COURT. Whose registration card is this?

Mr. CLEARY. Well, another defendant in another matter who was arrested at the same time.

By Mr. CLEARY:

Q. At this time I show you a document marked Defendant's Exhibit 3, for identification.

Do you recognize that document, sir?

A. Yes.

Q. Was that the document produced by Mr. Ortiz Rodriguez?

A. It was.

Q. Did you have a chance to examine that document
31 at that time, sir?

A. I examined it somewhat.

Q. Was there any discussion about the authenticity of that document?

A. Yes.

Q. Was it as a result of the discussion concerning the authenticity of that document that Mr. Rodriguez was placed under arrest?

A. You mean, counselor, after he was placed in the car?

Q. Well, do you know why he was placed in the car, sir?

A. Mr. Burrow and Mr. White had already made this determination.

Q. They had already looked at this card?

A. They had.

Q. Did any conversation take place within the car within your hearing, within your knowledge, as to the authenticity of this card?

A. Yes.

Q. And did that conversation result in the fact that statements to the effect—and I don't want the words—that this card was not an accurate card?

32 A. That is right.

Q. Was there any discussion at that time—at that time when you were discussing the card, concerning the defendant?

A. There was none.

Q. There was none.

O.K., what happened then after you had placed Mr. Ortiz under arrest?

A. Well, as I have already said, he was warned of his rights and he readily admitted his alienage and the fact that he was in the United States illegally.

Q. But you did return, or some immigration agents did return to the apartment where the defendant was staying, is that not correct?

A. Yes.

Q. Do you know who those agents are?

The COURT. Just a moment now, do you have an objection?

Mr. MACKENZIE. Your Honor, the questions are extremely leading at this point. Could he be a little bit more specific in the questioning of this witness?

The COURT. Yes, please try and do so.

33 Mr. CLEARY. Your Honor, I am trying to cut down the time—

The COURT. Yes, but in that we are not going to do away with the rules of the court either.

Mr. CLEARY. Yes, sir.

The COURT. The rules of procedure I should say, not rules of the court.

By Mr. CLEARY:

Q. To your knowledge did any of the agents return to the apartment where the defendant was staying?

A. Yes.

Q. Do you know who those agents were?

A. Yes.

Q. Would you tell the Court their names?

A. They were Investigator Burrow and Investigator White.

Q. These were the same two agents who made this street arrest of Mr. Ortiz, is that correct?

A. That is correct.

Q. Did you accompany them back to the apartment at that time?

A. No, I did not.

34 Q. When was the next time you saw these two agents?

A. When they returned with Mr. Ortiz and the defendant.

Q. At any time did you or any other agent in your group, to your knowledge, have a search warrant to enter the apartment of this defendant?

A. No, sir, we had none.

Mr. CLEARY. Thank you. I have no further questions of this witness, your Honor.

The COURT. Anything, Mr. District Attorney?

Mr. MACKENZIE. Yes, your Honor.

CROSS EXAMINATION

By Mr. MACKENZIE:

Q. Mr. Jacobs, you testified on direct that on the morning of November 19 you were present with a number of other agents

of the Immigration Service at the Roulon Corporation, is that correct?

A. That is correct, sir.

Q. I believe you also testified that a number of arrests were made at that corporation on that morning?

A. That is correct, sir.

35 Q. And that among the individuals arrested one Miguel Rico was taken into custody?

A. That is correct.

Q. Mr. Jacobs, when a defendant is taken into custody by immigration officers, is there a routine that the agents go through with the defendant prior to taking him downtown, to wherever he is going to placed, whatever institution he may be taken to for detention?

A. Yes, sir, there is.

Q. Would you describe that routine, please?

A. Usually aliens that have been taken into custody request—they make the request that they be permitted to obtain their possessions—

Mr. CLEARY. Excuse me, your Honor, I have to object as to relevancy—

The COURT. Yes, that is sustained.

Mr. CLEARY. Unless it is the routine of this defendant.

The COURT. That is correct. Sustained.

By Mr. MACKENZIE:

Q. Did Miguel Rico make a request of immigration officials that he be allowed to return to his residence to collect his 36 belongings?

Mr. CLEARY. I object to that as latent hearsay.

The COURT. It certainly is. Sustained.

Mr. MACKENZIE. Well, your Honor, the defendant's counsel requested permission to pursue a line of inquiry into the arrest of Miguel Rico as a grounds for his continued argument as to the presence of the agents at the residence.

The COURT. Let me have the question again, please.

Mr. MACKENZIE. Pardon?

The COURT. I am going to ask the reporter to read the question to me again.

(The pending question was read by the reporter.)

The COURT. I don't see the materiality of it.

Mr. MACKENZIE. Pardon me?

The COURT. You did pursue that line of questioning, he made a request—now, I know, don't put the finger up here.

Mr. CLEARY. No, sir, I'm sorry.

The COURT. All right. Go ahead.

37 Mr. CLEARY. The point I am getting at, and I don't believe in going around corners, but I would like to meet the issue head-on, and that is the question of consent of entering the apartment. It is my contention that the only way the Government can establish the consent is if they produce Miguel Rico, who is the one who gave orally the consent, unless he gave it in writing, and my point is that this is why the Government is leading this line of questioning, and my feeling is that they have an opportunity to present the man.

The COURT. I don't think you are right. If this man knows he can so state whether or not consent was given. If he doesn't know he can't so state, but he is an agent of the United States Government, and if such consent was given I think he can testify to it. You went into the arrest.

Mr. CLEARY. Well, your Honor—

The COURT. No, that's enough. Your objection is overruled.

By Mr. MACKENZIE:

Q. Mr. Jacobs, was such a request made by Miguel 38 Rico?

A. Yes, sir, it was.

Q. Mr. Jacobs, upon arriving at the address Miguel Rico gave you as being his residence, did you accompany Mr. Rico to his apartment?

A. Yes, sir, I did.

Q. Was there anyone else present with you at this time?

A. Yes, sir.

Q. Who was that?

A. Investigator Burrow.

Q. When you arrived at the apartment door of Miguel Rico, do you recall whether or not Mr. Rico had a key and unlocked the door himself?

A. I don't recall, but I believe that he knocked and the door was opened.

Q. I see. Was there any conversation at this time between Miguel Rico and yourself, or with Agent Burrow, that you overheard?

A. You mean between Miguel Rico and Agent Burrow?

Q. Yes.

A. At this time I don't recall.

Q. Who entered the apartment first?

39 A. Miguel Rico.

Q. Did he in any manner indicate to you or to Agent Burrow—and I refer to either by motion or by spoken word—his consent for you to follow him into the apartment?

A. Yes, sir, he did, by both.

Q. Would you state that?

A. He motioned for us to enter, and he also bid us enter. The COURT, Yes, counselor?

Mr. CLEARY. At this time, your Honor, I would like to object to the statements because if it is either by oral word, it's hearsay, or by conduct, it's hearsay, as to the actions of Miguel Rico, and I want to move that this testimony be struck, or in the alternative, the defendant be given an opportunity, and with Government funds since he is indigent, to try and locate this particular witness so that he can bring him into court contrary—to present testimony contrary possibly to this agent. Otherwise, the defendant's constitutional rights under the Sixth Amendment, a confrontation of witnesses, means almost an absolute nullity.

40 The COURT. The objection is overruled and the motion is denied.

By Mr. MACKENZIE:

Q. Once you had entered the apartment, Mr. Jacobs, you stated on direct that you identified yourself to the defendant?

A. Yes, sir.

Q. Do you see Dimas Campos-Serrano in the courtroom?

A. Yes, sir, I do.

Q. Would you point him out?

A. He is sitting at the end of the table, with the blue jacket.

Mr. MACKENZIE. Let the record show that the witness has identified the defendant Dimas Campos-Serrano.

The COURT. The record may so reflect.

By Mr. MACKENZIE:

Q. At this time did you advise the defendant Dimas Campos-Serrano of your purpose for being in the apartment?

A. Yes, sir, we did.

Q. And what did you say?

41 A. At the time of entry we first asked the defendant if Miguel Rico lived there, and he replied

that he did. This is as I recall it, and so he—and we told him then who we were and why we were there, that Miguel Rico was under arrest and we had come to let him get his belongings.

Q. I see, thank you.

Did you accompany Miguel Rico while he collected his belongings?

A. No, sir, I did not.

Q. What if anything did you do?

A. I talked to the defendant.

Q. You say you had a conversation with the defendant?

A. Yes, sir, I did.

Q. Where did this conversation take place?

A. It was in the—what would have been the living room, in approximately the area that led into the kitchen.

Q. Was there anyone else present that could have overheard this conversation?

A. Yes, sir.

Q. Who was that?

A. Investigator Burrow.

Q. Would you tell the Court, please, what you said
42 to the defendant at this time?

A. I asked him where he was from, and he told me from Mexico, and then I asked him under what circumstances he was in the United States, under what status under the immigration laws, and he replied as a resident, and then I asked him for proof, and he produced this document that I previously identified.

Q. Mr. Jacobs—

The COURT. Is it necessary, counselor, to go over this again?

Mr. MACKENZIE. This one point is, your Honor, because I think it does have a material bearing.

The COURT. Very well, proceed.

By Mr. MACKENZIE:

Q. I show you what has been marked Defendant's Exhibit 1 and ask you if that was the document that was presented to you by the defendant.

A. Yes, sir, it is.

Q. You stated that you examined it at this time, is that correct?

A. I did.

Q. And did you detect at this time any defects in that
43 document?

A. No, sir, I did not.

Q. Will you tell the Court if under—or would you tell the Court under what circumstances you examined this document?

A. I examined the document to see if it had been altered.

Q. And could you determine in the apartment at that time whether or not it was altered?

A. No, sir, I could not.

Q. Was there a reason for your inability to make such an examination at this time?

A. There was insufficient light.

Q. You say there was insufficient light. Were the lights on in the apartment?

A. No, sir, they were not.

Q. Did you notice whether or not there were any electric lights in the apartment?

A. I do not believe there were any in the living room. In fact, I'm rather certain there were not.

Q. What light was available to you for examination of this?

A. Light coming through the drawn shades.

44 Q. I believe you stated on direct that after looking at this document you asked the defendant for his passport?

A. Yes, sir, I did.

Q. And that the defendant stated that he did not have his passport?

A. That is correct.

Q. Based on your experience as an officer in the Immigration Service, is it common for individuals entering a foreign country to fail to have in their possession documents which would necessarily indicate their legal status in the United States?

A. No, sir.

Mr. CLEARY. I want to object to that, your Honor.

The COURT. Just a moment. State your objection, Mr. Cleary.

Mr. CLEARY. I would object to the question on the grounds that it calls for a conclusion.

The COURT. It does. Sustained.

By Mr. MACKENZIE:

45 Did the defendant Dimas Campos-Serrano state why he did not have his immigration document, his passport, with him at the time?

A. Yes, he did.

Q. And what was the reason that he told you?

A. He told me that he had mailed it back to Mexico.

Q. Did you ask him why he had mailed it back to Mexico?

A: Yes, sir, I did.

Q. And what was his reason?

A. He said that he feared losing it here in Chicago.

The COURT. Now, let's get along here.

Mr. MACKENZIE. Yes, sir.

By Mr. MACKENZIE:

Q. When was your next conversation with the defendant Dimas Campos-Serrano?

A. You mean, counselor, following the departure from the apartment?

Q. Yes.

A. It was en route to the office when Investigator Burrow had to stop for gas.

Q. Who was present at the time this conversation took place?

A. Investigator White.

46 Q. Who else?

A. Several aliens.

Q. Where did this conversation take place?

A. The defendant was sitting in Mr. Burrow's car, his vehicle, and I was standing outside the car talking to him.

Q. O.K., and would you tell the Court, please, what you said to the defendant and in turn what the defendant's response was to you?

A. I asked him his true name and other identifying data, and he gave me the name that is on this document. I then produced the document and I showed him where it could be readily seen it had been changed and asked him again his true name, and he gave it to me.

Q. Prior to asking the defendant these questions, were you informed as to whether or not the defendant had been advised of his rights?

A. Yes, sir, I had been.

Q. And who informed you of that?

A. Mr. White.

Mr. MACKENZIE. I have no further questions of this witness.

The COURT. Very well, anything further?

47 Mr. CLEARY. Just a few, your Honor.

The COURT. All right, Mr. Cleary.

REDIRECT EXAMINATION

By Mr. CLEARY:

Q. At the time the defendant was seen in Investigator Burrow's car he was under arrest, is that not correct?

A. Yes, sir, he was.

Q. And you gave him no warning whatsoever, is that correct?

A. I personally did not.

Q. Where did you take the defendant or where did you see the defendant taken?

A. He was taken—

Q. After he was arrested.

A. He was taken to this office building.

Q. This office building?

A. Yes, he was.

Q. On what floor was he taken, sir?

A. He was taken to the third floor.

Q. To the third floor, and again, of your own knowledge do you know what was done with him at that time?

A. After he was brought to the office I had no
48 further contact with him.

Q. Do you know if this was a weekday, and what weekday it was, November 19?

A. It was a weekday—I don't remember which one.

Q. Are you familiar with the office of the United States Commissioner in this building?

A. I have never been there.

Q. The defendant was not taken to that office, to your knowledge?

A. Not to my knowledge.

Mr. CLEARY. No further questions, your Honor.

The COURT. Very well, you may step down, Mr. Jacobs.

(Witness excused.)

49 Mr. CLEARY. At this time I would like to call Immigration Agent Burrow.

Clark Burrow, called as an adverse witness herein by the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. CLEARY:

Q. Would you state your name for the record, sir?

A. Clark Burrow.

Q. How do you spell your last name, sir?

A. B-u-r-r-o-w.

Q. Would you state your position or occupation?

A. I am an investigator for the U.S. Immigration Service.

Q. How long have you been engaged in that profession, sir?

A. Since April of '65.

Q. Have you been continuously employed in that particular vocation?

A. I have.

Q. On 19 November 1968 were you engaged as an
50 immigration investigator?

A. I was.

Q. Were you on that day a part of a task force arrest group?

A. I was.

Q. Do you remember when the arrests of 19 November 1968 were first discussed by members of the immigration office?

A. At first no—I know they were discussed prior to the—

Q. Were you a part of those discussions, sir?

A. Yes.

Q. How many immigration officials were present at that discussion?

A. Approximately eight, to the best of my knowledge.

Q. Do you know their names, sir?

A. Yes.

Q. Could you state them for the record, sir?

A. Mr. Bruce Ferguson, Mr. Bruce Peterson, Mr. Lewis, Mr. McLennan, Mr. White, Mr. Jacobs.

Q. Do you remember how many persons were listed to be arrested on the following day?

A. I do not, sir.

51 Q. Mr. MACKENZIE. Your Honor, I don't believe counsel has established the fact that there was such a list in existence, or whether there was—

The COURT. Well, he has already answered.

He said he doesn't.

By Mr. CLEARY:

Q. On the morning of the 19th what was your first action toward the arrests of that day?

A. Well, we—all the officers met at the—at the location, at the company at which suspects—not suspects, the persons were to be questioned and status determined—immigration status to be determined.

Q. Was that the Roulon Company, to your knowledge?

A. Yes, it was.

Q. And where at the Roulon Company did you agents meet?

A. In the vicinity.

Q. Do you know, roughly?

A. No particular location, no, sir.

Q. Do you remember what agents were present at that
52 time—well, first of all, do you know, what time did you
meet?

A. I do not recall. It was approximately 6:00 o'clock.

Q. In the morning?

A. In the morning, in the a.m.

Q. Do you remember who was there with you at the meeting?

A. All the above—all of the officers that I've mentioned.

Q. Do you remember how many persons were to be
interviewed?

A. I do not, sir.

Q. Do you have any estimate as to the number?

A. I do not, sir.

Q. Was it more than ten or less than ten?

A. I do not know.

Q. Were you present when Miguel Rico was interviewed?

A. I was not, sir. To the best of my recollection I was not.

Q. Do you remember how many persons were taken into
custody at the Roulon Manufacturing Company on that
morning?

A. No, sir, I do not. I do not know.

53 Q. Did you leave the Roulon Manufacturing Com-
pany that morning?

A. Pardon?

Q. Did you leave the Roulon Manufacturing Company, the
area of the Roulon Manufacturing Company that morning?

A. After our business had terminated—we had terminated
our business there.

Q. What business did you terminate?

A. Well, after we questioned suspects in the area or vicinity
of the

Q. What suspects did you question?

A. Aliens or persons suspected of being aliens.

Q. How many?

A. I do not know, sir. Several.

Q. And when did you finish your interview?

A. Approximately 8:00 o'clock in the a.m.

Q. What did you do at that time, if anything?

A. I proceeded with Mr. Jacobs and Mr. White. I followed them in a car.

Q. Did Mr. Jacobs and Mr. White have anyone in their custody at that time?

A. They did.

54 Q. Do you know who that person was?

A. No. No, sir, I do not.

Q. Was there any other person besides Agent Jacobs or Agent White and this other person?

A. I know there were other persons in the car. I do not know the number.

Q. Were they suspects?

A. Yes.

Q. Would you estimate the number—more than five or less than five?

A. Oh, less than five.

Q. Less than five.

Where did you go, sir?

A. We followed them to their—accompanied the aliens to their—to their residences.

Q. Which was the first residence you went to, sir?

A. I do not recall, sir.

Q. Do you know what section of the city it was in?

A. In the southwest, the vicinity of California and Cermak.

Q. Did you make, that morning, stops at several of 55 the residences of the suspects that you had in the car?

A. Yes, we did.

Q. Do you remember—you don't recall Miguel Rico, do you?

A. Yes, I recall him.

Q. O.K., do you remember stopping at his residence that morning?

A. Yes, I do.

Q. Do you remember what happened that time, if anything?

A. Well, Investigator Jacobs and I accompanied Miguel Rico to his apartment to obtain his personal property.

Q. Did you have a search warrant at that time, sir?

A. We did not.

Q. Did you have an arrest warrant for either Miguel Rico or the defendant Dimas Compos-Serrano?

A. No, sir.

Q. After Agent Jacobs and you entered the apartment what did you do?

A. I accompanied Miguel Rico to his room or the vicinity of his room, to observe his—his packing, packing of his personal property.

56 Q. How many rooms in the apartment?

A. To my knowledge four, as I recall.

Q. Did you look in any of the closets of the apartment?

A. On one occasion when—when Miguel Rico—as I recall, I accompanied Miguel Rico to his closet. He was to obtain some clothing from his closet. I first looked in the closet to see what property he wished to obtain there.

Q. Did you look at any of the—well, first of all, were the other rooms opened or closed?

A. To my knowledge they were all open. As I recall they were all open.

Q. Did you look in any of the other rooms, physically enter the other rooms?

A. I did not, sir.

Q. Did you look in any of Miguel Rico's drawers?

A. To my knowledge, no, sir.

Q. And you stood next to Miguel Rico as he packed some type of belongings?

A. I stood in the doorway to observe—partially observe Mr. Jacobs and then to observe Mr. Rico also.

57 Q. How far were you from Miguel Rico?

A. A matter of four yards, five yards, something like that.

Q. About 15 feet?

A. Something like that.

Q. How far were you from Agent Jacobs?

A. Approximately the same, maybe less.

Q. Did you overhear the conversation that took place between—oh, excuse me.

Do you know whether a conversation took place between Agent Jacobs and Mr. Campos?

A. I do.

Q. Did you overhear that conversation yourself?

A. Not all of it, no, sir.

Q. Did you examine any of the documents tendered by Mr. Campos to Agent Jacobs?

A. Yes, I did.

Q. At this time, sir, I am showing you two documents, one marked Defendant's Exhibit 1, for identification, and another marked Defendant's Exhibit 2, for identification.

Were these the documents tendered to you by Agent Jacobs?

58 A. They are.

Q. When you looked at these documents, sir, what did you specifically look at on the documents themselves, if anything?

A. First of all, I paid particular attention to the alien registration card, the Form I-151, to ascertain that the picture was the same as the subject presenting the document.

Q. Did you have an opportunity to look at the picture on the card and compare it with Mr. Campos?

A. Yes.

Q. Did you look at anything else on the card?

A. And, of course, the name.

Q. Where is that located on the card, sir?

A. On the reverse side—or on the side other than the picture.

Q. Did you look at the name?

A. I did.

Q. Did you look at the social security card?

A. I did.

Q. And by any reason did you compare the name on the social security card with the name on the alien registration card?

A. I did.

59 Q. Did you ask any questions of Mr. Campos?

A. To my knowledge, no, sir.

Q. And what did you and Agent Jacobs do after the conversation with Mr. Campos?

A. By this time Mr. Rico had obtained all of his personal effects, all of the personal property that he wished, and we left the apartment.

Q. Now, to your knowledge what personal property did Mr. Rico have with him?

A. Clothing.

Q. What type of clothing, sir, if you know?

A. Rough clothing, work clothing. As far as items, I could not mention.

Q. Do you have any idea how big his bundle was?

A. I don't—I do not recall.

Q. Do you know whether he had shoes with him or not?

A. This I do not recall.

Q. Do you know whether he had a pair of trousers with him?

A. Yes, he had several things with him, but the size or the amount, this I do not know.

Q. And then you, and Agent Jacobs left the
60 apartment?

A. That's right, sir.

Q. Thereafter you and Agent—well, did you have an opportunity on that day to meet Mr. Ortiz Rodriguez?

A. Yes, sir—Mr. Ortiz.

Q. Mr. Ortiz?

A. Right.

Q. Would you relate the circumstances surrounding your meeting with this individual on that day?

A. After Investigator Jacobs and Miguel Rico and myself arrived back at the car, Mr. White, Investigator White had observed this subject approaching him on the sidewalk. He noticed that this—what appeared to him, as he related to me, that the subject kind of—sort of hesitated when he saw us arriving, approaching the cars, and thought it might be worthwhile to question the subject.

Q. Did you question the subject?

A. I did.

Q. Was anyone else present besides Mr. Ortiz and yourself?

61 A. Mr. Jacobs arrived—Mr. White arrived there shortly thereafter, after I had approached the subject.

Q. You initiated the interview with Mr. Ortiz?

A. Right.

Q. Did you identify yourself, sir?

A. I did.

Q. What did you say if anything to ~~Mr.~~ Ortiz?

A. I asked him his citizenship—of what country he was a citizen.

Q. And did you say anything else to him?

A. He—he answered me.

Q. Well, I am not concerned with what he said, I am concerned with what you said to him.

The COURT. Well, I might be, though.

Mr. CLEARY. Well, yes, sir. I mean—

The COURT. He is not going to recite only one part of the conversation.

By Mr. CLEARY:

Q. All right, what did Mr. Ortiz say to you?

A. He answered me with Mexico, that he was a citizen of Mexico.

Q. And what did you say to him, if anything?

A. And he produced—at that moment produced an 62 alien registration card.

Q. Did you examine that alien registration card?

A. I did, sir.

Q. As a result of your examination of that card, what did you do, if anything?

A. After examining it I handed it to Investigator White, who also examined the card.

Q. Why did you hand the card to Investigator White?

A. Because it appeared altered.

Q. In what respect was it altered, sir?

A. The lamination appeared to be different from that normally on—on alien registration cards.

Q. What did Agent White do, if anything, with the card?

A. He too examined it and inquired of me that the card did appear altered, and we—the subject was taken into custody.

Q. Did you give him any particular warning at that time?

A. The subject was placed in the car—

The COURT. Rather than use "the subject," are you 63 talking about the defendant?

Mr. CLEARY. No, sir, Mr. Ortiz.

The COURT: All right, let's get the names in here for the purpose of the record, because to use "the subject" is confusing.

Mr. CLEARY: Yes, sir.

By Mr. CLEARY:

Q. Did you give any warnings to Mr. Ortiz at that time?

A. I did not.

Q. When you took Mr. Ortiz into custody did you put any handcuffs or any other type of restraints on him?

A. No, sir.

Q. You placed him in the car, is that not correct?

A. Yes, sir.

Q. Within your knowledge and what you observed, did you see any other immigration agent give him a warning?

A. I know the—well, I was told that the subject was—Ortiz was—

Q. I am not concerned with that. You didn't see anybody give him a warning?

64 A. No.

Q. Do you speak Spanish, sir?

A. I do.

Q. During your conversation with Mr. Ortiz was the name of Mr. Campos brought up?

A. It was not.

Q. After your conversation with Mr. Ortiz what did you do, if anything, then?

A. Well, we proceeded to leave the location.

Q. You proceeded to leave the location?

A. Right.

Q. Did you get into your vehicle?

A. Right.

Q. Did you drive off?

A. No.

Q. What did you do then before you drove off?

A. The subject was—

Q. Who is "the subject" now?

A. Mr. Ortiz was questioned concerning his—or he was asked if he had clothing, personal property, at home, that he would like to obtain prior to going to the office.

Q. Do you know who asked him this question?

65 A. No, sir, I do not.

Q. As a result of that questioning what was said or done?

A. He advised that he—Mr. Ortiz advised that he did have personal property that he wished to obtain and advised us of his address.

The COURT. Why don't we pause there for a moment, Mr. Cleary?

Recess this court for a few moments.

Do not discuss your testimony with anyone while you are off the stand.

Mr. CLEARY. Your Honor, could I ask that the witness be instructed not to talk to anyone?

The COURT. I have just done so.

Mr. CLEARY. Thank you, your Honor.

(A short recess was taken.)

The COURT. All right, Mr. Cleary, you may proceed.

Mr. CLEARY. Thank you, your Honor.

By Mr. CLEARY:

Q. After your conversation with Mr. Ortiz about his clothing where did you go, if any place?

A. We followed him to — Mr. White and I followed Mr. Ortiz to his apartment.

Q. Where was this apartment?

A. It was the same as that of Miguel Rico.

Q. How did you gain entry into that apartment, if you entered?

A. Mr. Ortiz proceeded as to the door and gained entry. I do not recall whether or not he had a key or he knocked on the door to gain entry.

Q. What did you do at that time after you entered?

A. We—I again told—or I told Mr. Campos our reason for being there.

Q. What did you tell him?

A. That we were there to—to obtain the clothing of Mr. Ortiz.

Q. O.K., did you say anything further to Mr. Campos?

A. Yes.

Q. What did you say?

A. I asked him for his—I asked for his alien registration card.

Q. Had you not previously examined that card?

A. I did.

Q. Why did you ask him for this card?

67 A. Because Mr. Ortiz presented an altered—what appeared to be an altered alien registration card—and I thought since there was one in the apartment there was a possibility that Mr. Campos' card too was altered.

Q. Did you examine this card?

A. I did.

Q. Was Mr. White—excuse me—yes, Agent White, present?

A. He was in the vicinity.

Q. What do you mean by in the vicinity?

A. He was not present at the time when Mr. Campos handed me the card, but he was in the adjoining room.

Q. Prior to asking for the card from Mr. Campos, did you advise him of any rights?

A. No, I did not.

Q. After securing the card from him did you advise him of anything whatsoever?

A. Yes, sir, later.

Q. I mean at the time after—after you secured the card?

A. At the time he presented the card to me, no, sir.

68 Q. After you got the card from him, immediately thereafter, did you give him any warning?

A. In what length of time?

Q. Immediately, right then.

A. No, sir.

Q. Did you say to him anything about possible alteration of the card?

A. As I recall I told him that the card appeared altered, and I asked him if he was sure that this was the card, his card.

Q. What did you do then, if anything?

A. The subject was—Mr. Campos was taken into custody and told to obtain his clothing, personal property that he wished, the property that he had wished to carry with him.

Q. Did you tell him to obtain his property or did you say he might obtain his property?

A. He might obtain his property.

Q. You placed him in the vehicle outside, is that correct?

A. Yes, he was taken to the vehicle.

Q. And from there transported to the Federal Building here?

A. Yes.

69 Q. At any time did you—or do you have knowledge of any agents taking him to the U.S. Commissioner's office on the 24th floor?

A. No, sir.

Mr. CLEARY. I have no further questions of this witness.

The COURT. Very well, Mr. Cleary.

Mr. District Attorney.

CROSS EXAMINATION

By Mr. MACKENZIE:

Q. Mr. Burrow, you stated that you accompanied Mr. Rico while he secured his personal property, is that correct?

A. Yes, sir.

Q. And I believe you stated that you did examine the closet when he approached this closet to secure some of his property?

A. Yes, sir, that is correct.

Q. What was the purpose in doing that?

A. To make sure that there were no weapons present and that it was not an exit from the room.

Q. Jumping ahead a little bit in time, after you had encountered Mr. Rodriguez Ortiz and determined that his—the document he presented in support of his status in the
70 United States was altered, and that he requested permission to return to his apartment to get his property—at this time did you have any reason to suspect that the apartment that Mr. Ortiz would be returning to was the same apartment in fact that was occupied by Mr. Campos-Serrano, the defendant in this case?

A. No, sir, I did not.

Q. Did Rodriguez Ortiz tell you he was returning to the apartment of Mr. Serrano?

A. No, sir, he did not.

Q. Did he give you an apartment number that he was returning to?

A. No, sir.

Q. Did he lead you to his apartment?

A. He did, sir.

Q. And was the first time you realized that it was the same apartment that you had previously been in—was the first time you realized it when you actually were at the door?

A. Right, sir. Yes, sir.

Q. You stated that upon entry into the apartment Mr. White accompanied Rodriguez Ortiz while he gathered his belongings and that you again questioned the defendant Dimas
71 Campos-Serrano.

What prompted you to initiate for a second time the questioning of the defendant?

A. The fact that Mr. Ortiz had what appeared to be an altered alien registration card; and the fact that the lighting was dim in the room on the first—first visit to the apartment.

Q. Mr. Burrow, I show you now what has previously been marked Defendant's Exhibit 1 and Defendant's Exhibit 2, but which I have marked Government's Exhibit 1, for identification, and Government's Exhibit 2, for identification, and showing you Government's Exhibit 1, first, can you identify that document?

A. I can, sir.

Q. Was this the document that the defendant presented to you in his apartment on the morning of November 19 in support of his status of being lawfully in the United States?

A. It is, sir.

Mr. MACKENZIE. Your Honor, at this time I offer what has been marked Government's Exhibit 1, for identification, being the immigration document I-151, with the name appearing thereon, Dimas Vargas Garcia. Both sides are being offered into evidence as Government's Exhibit 1.

72 Mr. CLEARY. Subject to my standing motion to suppress—
The COURT. Overruled.

Government's Exhibit 1 may be admitted into evidence.

Mr. MACKENZIE. Would you strike the identification mark?
The COURT. The identification mark may be stricken.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 1.)

By Mr. MACKENZIE:

Q. I show you what has previously been marked Defendant's Exhibit 2, which is now marked Government's Exhibit 2, for identification, and ask you if you have ever seen that document before.

A. I have, sir.

Q. Was this the document that was presented by the defendant Dimas Campos-Serrano on the morning of November 19 in his apartment?

73 A. It is, sir.

Mr. MACKENZIE. I now offer Government's Exhibit 2, for identification, into evidence, being the social security card of the defendant Dimas Campos-Serrano, the name appearing on said card being Dimas Garcia Vargas.

The COURT. Subject to your same objection?

Mr. CLEARY. My same objection as to the motion to suppress, your Honor.

The COURT. Yes. It will be overruled and it will be admitted.
(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 2.)

By Mr. MACKENZIE:

Q. You stated that the card was examined by you.
Did your examination at this time take on any characteristic that was different from your prior examination of the card?

Mr. CLEARY. I object to the form of the question.

The COURT. It is objectionable, counselor.

74 Mr. MACKENZIE. Yes, sir, I will rephrase it, your Honor.

The COURT. All right.

By Mr. MACKENZIE:

Q. Would you tell the Court the manner in which you analyzed the immigration document that was presented to you by the defendant the second time you were in the apartment?

A. I took the card to a location where there was more light.

Q. Where was this?

A. As I recall, in the kitchen of the apartment.

Q. Did you have any aid available to you in this examination that you did not have previously?

A. Yes. As I recall, a flashlight. We had a flashlight in the kitchen area, which was also lighter itself than the previous room in which the document was examined.

Q. I see.

A. Also, Mr. White—Investigator White was present at the examination of the document, at the time it was examined.

Q. I see. After you had examined the card, and believed or determined it was altered, to your satisfaction, you 75-76 stated that you then took the defendant into custody, is that correct?

A. Yes.

Q. And the defendant was permitted to recover his belongings from the apartment?

A. Yes.

Q. Did you then leave the apartment with the defendant and with Ortiz?

A. Yes, after his clothing was obtained.

Q. After his clothing was obtained?

A. Yes.

Q. Did you at any time after leaving the apartment or in the process of leaving the apartment, advise the defendant Dimas Campos-Serrano of his rights?

A. I did.

Q. And would you describe that, please?

A. After we left the apartment, in walking to the car I advised the subject of his rights.

Mr. MACKENZIE. I have no further questions, your Honor.

The COURT. All right.

77

REDIRECT EXAMINATION

By Mr. CLEARY:

Q. Did Mr. Ortiz ever expressly consent to your entry or the entry of Agent Burrow into his apartment?

A. You are referring to Agent White, sir?

Q. Agent White.

A. No, sir, he did not.

Q. And could you—

Mr. CLEARY. For the sake of ease I am trying to expedite this, your Honor.

The COURT. Very well, go ahead.

By Mr. CLEARY:

Q. I would like you to write out in Spanish the warning you gave to the defendant.

Mr. MACKENZIE. I object to that.

The COURT. Just a moment now. Did he give the warning to him orally?

Mr. CLEARY. I believe so.

Is that correct?

The COURT. You did?

The WITNESS. Yes, sir.

The COURT. Did you give it to him orally?

The WITNESS. Yes, sir, orally.

78 Mr. CLEARY. It will have to be in Spanish then, your Honor.

The COURT. Well, she understands Spanish.

Mr. CLEARY. Right. If I could have him write it down, because this is a critical thing—

The COURT. Well, all right, you give it to him orally, and you may write it out in Spanish. I know Mr. Kusibab will have trouble writing it in Spanish.

By Mr. CLEARY:

Q. O.K., could you very slowly, please, repeat the exact words, to the best of your knowledge, the words you used in advising Mr. Campos on the way to the car of his rights.

A. (The answer was in Spanish.)

79 The COURT. Is that it?

The WITNESS. Yes, sir.

The COURT. Now, you have him give it to us in English.

By Mr. CLEARY:

Q. I was just going to ask, would you repeat it for us in English, please?

A. Before we ask you any questions—

The COURT. This is what you said to the defendant?

The WITNESS. Excuse me, sir—

By Mr. CLEARY:

Q. This is in English what you said to the defendant?

A. Yes, the translation.

The COURT. All right.

By the WITNESS:

A. "Before we ask you any questions you must know your rights. You have the right to remain silent. Anything you say may be used against you in any court of law, administrative proceeding or immigration proceeding. Before we ask you any questions you have the right to consult a lawyer—an attorney."

80 The COURT. Is that it?

The WITNESS: Yes, sir.

By Mr. CLEARY:

Q. O.K. You advised him of this as you were walking from the apartment to the car, is that correct?

A. Yes, sir.

Q. He was walking and you were walking as this statement was given?

A. Yes.

Q. Was Agent White present?

A. He was.

Q. As you were giving this warning?

A. He was—we were all proceeding to the car.

Q. Prior to leaving the apartment did the defendant ever make a statement to you indicating that he knew this was a false card?

A. No, sir.

Q. He made no incriminatory statement prior to that time?

A. That's right.

Mr. CLEARY. I have no further questions your Honor.

81 At this time I would like to call—I'm sorry.

Mr. MACKENZIE. I would like one question on recross.

RECROSS EXAMINATION

By Mr. MACKENZIE:

Q. When was the first time the defendant, to the best of your knowledge, did admit to the fact that the document he had presented was false and altered, and volunteered his real name?

A. After we had boarded the car and were proceeding to the office I stopped for gas and Investigator White and Jacobs also—we were traveling together—they also stopped with me, and Mr. Campos advised us—gave us his true and correct name.

Q. At this time?

A. At this time, yes.

Q. And this was subsequent to the warning of his right to remain silent that was given to him as you proceeded out of his apartment?

A. Yes, sir.

Q. Prior to that time he maintained his innocence?

A. Yes, sir.

82 Q. And that the document was accurate, and that he was the man that it purported to be?

A. Yes, sir.

Mr. MACKENZIE. No further questions, your Honor.

The COURT. You may step down.

(Witness excused.)

Mr. CLEARY. At this time I would like to call Immigration Agent White.

Adolphus B. White, called as an adverse witness herein by the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. CLEARY:

Q. Would you state your name for the record, sir?

A. Adolphus B. White, Jr.

Q. What is your business or occupation?

A. I am an investigator for the United States Immigration and Naturalization Service.

83 Q. What office do you work with or are you assigned to?

A. Our Chicago office.

Q. On 19 November 1968 were you so employed?

A. Yes.

Q. How long have you been employed as an Immigration and Naturalization Service investigator?

A. As an investigator, since June 1966.

Q. How long have you been with the INS?

A. Since August 1957.

Q. On the morning of 19 November 1968 did you have occasion to meet a Mr. Ortiz?

A. Yes.

Q. Where was that, sir?

A. That was on California—I don't recall the exact address.

Q. Was that somewhere in the City of Chicago?

A. Yes, on California.

Q. Would you know in what part of the city that would be?

A. That's on the South Side.

Q. What were the circumstances surrounding your initial contact with Mr. Ortiz?

In other words, where did you first see him?

84 A. I was sitting in the Government car with some aliens that we had in custody, and I observed Mr. Ortiz coming down the sidewalk towards us.

Q. What if anything did you observe him do?

A. Well, it appeared that when he saw the car setting there that he came to a stop and looked around nervously, then continued walking slowly down the sidewalk.

Q. Were you or any of your other agents in uniform at that time?

A. No, we were not.

Q. Was there any type of markings on the car to indicate it was a Government vehicle?

A. No.

Q. What did you do after he stopped?

A. I continued to wait in the car.

Q. How long did you continue waiting in the car?

A. Well, it was a short period of time. I wouldn't say exactly how long.

Q. More than ten minutes, less than ten minutes?

A. Oh, less, less.

Q. Then what did you do after waiting?

85 A. Well, when—as he approached nearer to the car I was intending to get out to speak to him myself, but at this time Investigators Burrow and Jacobs and an alien came out of the building and as the man approached then Mr. Burrow questioned Mr. Ortiz.

Q. Did you talk to Agent Burrow before Agent Burrow talked to Mr. Ortiz?

A. I believe I did. I think I rolled the window down and mentioned to him that that fellow looked suspicious.

Q. Suspicious. Were you then with Agent Burrow when Mr. Ortiz returned to his apartment?

A. Yes, I was.

Q. Do you know under what circumstances Mr. Ortiz was returning to his apartment?

A. He was returning at his request to get his clothing and personal possessions.

Q. And at any time did Mr. Ortiz consent to the entry of you or Agent Burrow into that apartment?

A. Well, he asked to go back, and when we got to the door, as I recall, he produced a key and opened the door, and we just all went in together.

Q. He never invited you in, is that correct,
86 sir?

A. No, he never asked me to come in, no.

Q. What did you do once inside the room, sir?

A. I continued with Mr. Ortiz to the area that he indicated he had his clothing and personal possessions, and again, he gathered them together.

Q. What type of clothing did he gather together, sir?

A. I don't recall. He had shirts and trousers, that sort of thing. I couldn't say exactly.

Q. Do you know how much—was it a big bundle, a small bundle?

A. I don't recall.

Q. Did you observe Agent Burrow's actions?

A. Yes.

Q. What did you observe him do, if anything?

A. As we entered the apartment Mr. Campos came out of another room and Mr. Burrow proceeded to go over and speak with him.

Q. At any time—well, did you overhear the conversation between Agent Burrow and Mr. Campos?

A. No, I didn't pay any attention initially. I was following Mr. Ortiz to see what he was doing.

87 Q. At any time did you pay any attention to the conversation?

A. Well, Mr. — I don't recall any exact conversation at that time between them. I know that he was questioning the — Mr. Campos.

Q. Do you remember when Agent Burrow advised, if he did at all, Mr. Campos of his rights?

A. That was as we were leaving the apartment and on the way to the car.

Q. Did you overhear him advise—use the wording of the rights?

A. Yes.

Q. Could you repeat to this Court in English the words that he used in Spanish?

A. Well, not exactly.

Q. To the best of your recollection, sir.

A. He advised him that he had a right to remain silent and that anything he said could be used against him, and I'm sure he told him that he had the right to a lawyer and so forth. I don't recall the exact—his exact wording.

Q. Was he standing still at the time he addressed the defendant, or was he moving?

A. Well, they were moving from the front door out 88 to the car.

Q. Did you observe any words of acknowledgment that he had heard that statement from the defendant?

A. As I recall, Mr. Burrow asked him if he understood, and he indicated yes, he did.

Q. At any time did you have a search warrant to enter the apartment of Mr. Ortiz?

A. No, sir.

Q. At any time did you have an arrest warrant for Mr. Ortiz?

A. No, sir.

Q. At any time did you have an arrest warrant for Mr. Campos?

A. No, sir.

Mr. CLEARY. No further questions.

Your witness, sir.

The COURT. Yes, Mr. District Attorney.

CROSS EXAMINATION

By Mr. MACKENZIE:

Q. Mr. White, you testified that Agent Burrow encountered Ortiz on the street, questioned him, and that Ortiz was taken to the car.

89. Did you at that time advise Ortiz of his rights?

A. I believe Mr. Jacobs advised him after we were inside the car.

Q. Did you overhear him receive his rights?

A. Yes, sir.

Q. Advise him of his rights?

A. Yes, sir. He was in the car.

Q. And was the statement that was made to him similar to the one you have just testified to had been made to the defendant in this case?

A. Yes, I believe Mr. Jacobs—as I recall, he read it off a form that we have.

Q. I see.

Did Mr. Ortiz acknowledge at this time that it was a false document?

A. Yes, after a few questions he admitted his true identity.

Q. And you stated that he requested that he be allowed to return to his apartment to collect his belongings?

A. Yes, sir.

Q. Would there be any purpose in returning to the apartment at this time other than to allow Ortiz to collect his belongings?

90. A. No, sir.

Q. You had no reason at this time to believe that the apartment occupied by Ortiz was in fact the apartment also occupied by the defendant in this case?

A. No, sir, we didn't know that until we got to the door. He just said, "I live here," and he led us back to the door.

Q. Therefore, you were going back with Ortiz in order to permit him, at his request, to obtain his belongings prior to being taken to a place of detention?

A. Yes, sir.

Q. As you were observing Mr. Ortiz collect his belongings, did Agent Burrow come over to you with the I-151 form that he received from the defendant?

A. Yes, sir.

Q. I show you what has been marked Government's Exhibit 1 and ask you if you can identify that card.

A. Yes, sir, this is the alien registration card that Mr. Burrow showed me.

Q. Mr. White, did you have in your possession at that time a flashlight?

A. Yes, sir.

91 Q. And did you and Agent Burrow proceed to examine the card with the use of that flashlight?

A. Yes, sir.

Q. Was the flashlight necessary, in your opinion—

Mr. CLEARY: I would like to object to the question, calling for a conclusion.

The COURT: Yes, objection sustained.

By Mr. MACKENZIE:

Q. What circumstances in the apartment required you to use a flashlight?

A. The light was very dim in the apartment, as I recall.

Q. Did you examine the document?

A. Yes, sir.

Q. What was your conclusion as to the—

Mr. CLEARY. Again—

The COURT. Yes.

By M. MACKENZIE:

Q. Upon examination what if anything did you notice?

A. I noticed that the card appeared to have been altered, that the picture was probably—or appeared that it had been changed, and also some erasure on the reverse of the document.

92 Q. Mr. White, I show you Government's Exhibit—what is marked Government's Exhibit 3, for identification, purporting to be a warning form, and ask you whether or not you have seen that before.

A. Yes, sir, it bears my signature.

Q. It does bear your signature.

Was it signed by you on or about the date it bears?

A. Yes, sir, it is signed and dated, and the time is noted.

Q. Was this delivered to the defendant Dimas Campos-Serrano?

A. Yes, sir.

Q. Was it presented by you, personally?

A. Yes, sir.

Mr. MACKENZIE. Your Honor, at this time I offer Government's Exhibit 3—

Mr. CLEARY. I haven't seen it yet.

Mr. MACKENZIE. Excuse me.

The COURT. Let him look at it.

Mr. CLEARY. May I have a few questions?

The COURT. On voir dire?

Mr. CLEARY. Yes, sir.

93 The COURT. Yes, of course.

Mr. MACKENZIE. I have just one more question.

By Mr. MACKENZIE:

Q. Did you witness the defendant signing the document?

A. Yes, sir.

Mr. MACKENZIE. I now offer Defendant's Exhibit 3, for identification, into evidence.

The COURT. All right, counselor, proceed with your voir dire on it.

Mr. CLEARY. Yes, sir.

VOIR DIRE EXAMINATION

By Mr. CLEARY:

Q. Where did you execute this particular document?

A. In our office, in the Federal Building.

Q. That is the building here, is that correct?

A. Yes, sir.

Q. Does that indicate the time, that notation, 11:30 a.m.?

A. Yes, sir.

Q. And that would be 11:30 a.m. in this building?

94 A. Yes, sir.

Q. How long is that after the arrest, in time?

A. Approximately two and a half hours.

Q. That warning was given after the defendant made his incriminatory statement in the motor vehicle, was it not?

A. This was presented, yes.

Mr. CLEARY. I have no objection to this exhibit.

Mr. MACKENZIE. What did he say—what was his response to your last question?

Mr. CLEARY. It was given after this statement in the car.
The COURT. It may be admitted, there being no objection.

Mr. MACKENZIE. Would you strike the identification mark, please?

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 3.)

Mr. MACKENZIE. I have no further questions of this witness, your Honor.

The COURT. Very well, go ahead.

85 Mr. CLEARY. I have no further questions, your Honor.

The COURT. Very well, if not, you may step down, Mr. White.

(Witness excused.)

Mr. CLEARY. I would just like—

The COURT. Yes, go ahead.

Mr. CLEARY. One short witness, the defendant in this matter, your Honor. I will be very short.

The COURT. Very well, call him.

Have him step up.

Mr. CLEARY. At this time, your Honor, I would ask permission to use the immigration interpreter for the ease of his court experience, and I think it would expedite things here.

The COURT. Very well.

Mr. MACKENZIE. Your Honor, at this time I would like to bring to the Court's attention that the interpreter may be testifying for the Government.

Mr. CLEARY. I understand.

The COURT. Are you willing to accept this condition?

Mr. CLEARY. Yes, sir.

96 The COURT. Very well.

Wait now until we get the interpreter to interpret the oath for you.

Come up here, sir, and raise your hand so that the clerk may swear you.

(Interpreter Albert Wimer duly sworn.)

The COURT. Very well.

The CLERK. Now, will you repeat the oath to him?

The COURT. Repeat the oath to him, please.

Dimas Campos-Serrano, the defendant herein, having been first duly sworn, through an interpreter, was called as a witness in his own behalf, and was examined and testified through an interpreter as follows:

DIRECT EXAMINATION

The COURT. Let the record show that the oath was administered by the clerk, through the interpreter, so that there will be no question about it.

All right, let him sit down.

You may sit down.

By Mr. CLEARY:

97 Q. Would you state your name for the record, please?

A. Dimas Campos-Serrano.

Q. Are you the defendant in this case?

A. Yes.

Q. Do you remember the day on which you were arrested, 19 November 1968?

A. Yes, I remember.

Q. On that day, at any time—

Interpreter ACTELINA LA PORTE. Will you speak louder so I can hear it, too?

The COURT. All right.

By Mr. CLEARY:

Q. On that day, at any time, did you give consent to immigration agents to enter your apartment?

A. I was sitting on the bed. I had just arrived from work and the investigators came and with a friend of mine, inside of my apartment.

Q. But did you give consent for the investigators to come into the apartment?

A. No, I didn't.

Q. After the second entry of the immigration agents into your apartment, did you admit that it was a false alien registration card that you had?

98 A. They came in and they showed me the card, and they told me that the card was issued to a woman.

Then I—then I told them that it wasn't mine.

Q. Did you make this statement in the apartment to the agents?

A. Yes.

Q. When were you first advised of your right to remain silent and your right to have an attorney to assist you?

A. That happened at the office of the Immigration Service.

Mr. CLEARY. No further questions.

The COURT. Anything, Mr. District Attorney?

Mr. MACKENZIE. Yes, just one or two questions, your Honor.

CROSS EXAMINATION

By Mr. MACKENZIE:

Q. Would you ask the defendant what he understands the word "consent" to mean?

Mr. CLEARY. Your Honor, I am going to have to object to the question, the question of consent. The conclusion is 99 to be drawn by this Court based upon facts.

The COURT. I think his objection is well taken, Mr. District Attorney.

Mr. MACKENZIE. Well, your Honor, this is a language problem here, and the defendant is stating that he did not give consent. I think it is very material.

The COURT. I think the question—I think counsel is right—whether he did or he did not bears upon the testimony of the agents that have testified and his testimony, and that is my job.

Mr. MACKENZIE: All right, your Honor.

The COURT. All right.

By Mr. MACKENZIE:

Q. Would you ask the defendant if he opposed the entrance of the immigration officers into the apartment in any way?

A. No, I did not oppose that.

Mr. MACKENZIE. No further questions.

The COURT. Very well, any further questions?

Mr. CLEARY. No further questions, your Honor.

100 The COURT. Tell him to step down, would you please?

(Witness excused.)

The COURT. Mr. Cleary.

Mr. CLEARY. I have no further evidence to offer on behalf of the defendant Dimas Campos-Serrano.

The COURT. Thank you.

Do you have anything?

Mr. MACKENZIE. Yes, sir, I have two very short witnesses, your Honor.

The COURT. I do have a pretrial set at 4:30.

You say you have two very short witnesses?

Mr. MACKENZIE. Yes, your Honor.

The COURT. Very well, bring them out.

Mr. MACKENZIE. I will call Mr. McLennon.

John T. McLennon, having been called as a witness herein for and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MACKENZIE:

Q. Mr. Witness, would you state your name, please?

101 A. McLennon, John T.

Q. What is your occupation, Mr. McLennon?

A. Investigator, Immigration and Naturalization Service.

Q. Mr. McLennon, calling your attention to November 20, 1968—of this year—did you have occasion to question an individual by the name of Dimas Campos-Serrano?

A. Yes, sir.

Q. What were the circumstances of that questioning?

A. I was asked to take a question and answer statement from Dimas by one of my co-workers who had another—another assignment he had to take.

Q. And did you in fact question the defendant Dimas Campos-Serrano at that time?

A. Yes, sir.

Q. Who was present during this questioning?

A. Mr. Dimas and Mr. Wimer, the Service interpreter.

Q. Did you state Mr. Wimer was an interpreter?

A. Yes, sir.

102 Q. Prior to conducting any inquiry or any questioning of the defendant, did you advise him of his rights?

A. Yes, sir.

Q. And this was in his own language, —

A. Yes, sir.

Q. Translated by the interpreter?

A. Yes, sir.

Q. Was the defendant Dimas Campos-Serrano then placed under oath?

A. Yes, sir.

Q. Would you describe the manner in which the questioning is conducted so that the Court understands how you approached the questioning.

A. Mr. Wimer is also a typist as well as an interpreter, and I would ask the question—Mr. Wimer would write it on the typewriter and then he would ask the question and the —

Q. Excuse me —

A. In Spanish.

Q. Yes?

A. And then he would type the answer or tell me what the response was, and then type the answer.

103 Q. I see.

I show you what has been marked Government's Exhibit 4, for identification, and ask whether or not you have ever seen that before:

A. Yes, sir.

Q. Does your name and signature appear thereon?

A. Yes, sir, on the last page of the statement.

Q. Did you in fact ask of the defendant the questions that are indicated thereon?

A. Yes, sir, I did.

Q. And to the best of your knowledge were the responses of the defendant described—or transcribed thereon?

A. Yes.

Q. Did you witness the signing of that document by the defendant?

A. I did.

Q. Do you see the defendant present in the courtroom?

A. Yes, sir.

Q. Would you point him out?

A. Sitting next to the—to the defense interpreter.

Q. Could you describe him a little—

Mr. CLEARY. We have no objection—

The COURT. No, the record may so reflect that he identified the defendant.

Mr. MACKENZIE. Counsel, do you care to examine this?

Mr. CLEARY. Can I have just a short voir dire?

The COURT. Surely.

VOIR DIRE EXAMINATION

By Mr. CLEARY:

Q. In the time you took, and the place and the date of this particular document, what was that—what date was that?

A. Well, that form—that form, I-214, indicates the date and time and place.

Q. The 20th of November. What time during the day?

A. Well, to be sure, I would have to look at that to refresh my memory, but it was—I'd say it was from about 11:00 to 2:00—11:00 a.m. to 2:00.

Yes, time commenced was 11:50 a.m., time completed was 2:30 p.m.

105 Q. In your warning, sir, did you at any time make reference to the fact that any prior incriminatory statement could not be used against the defendant?

A. I don't understand the question.

Q. Did at any time in your warning—you went through enumerated rights here at the beginning?

A. Yes.

Q. Did you say that any prior incriminatory—incriminating statement made by you—meaning the defendant—could not be used against you?

A. No, sir.

Q. Did you make any statement of that nature to the defendant?

The COURT. I think he answered it pretty directly for you—

Mr. CLEARY. All right.

The COURT. That he did not.

Mr. CLEARY. I will withdraw my last question, your Honor.

The COURT. All right.

106 Mr. CLEARY. I have no further questions other than my standing motion to suppress this particular confession.

The COURT. Your standing motion will be overruled.

Mr. MACKENZIE. Your Honor, I now offer Government's Exhibit 4 for identification, into evidence. This is the record of the sworn statement of the defendant Dimas Campos-Serrano.

The COURT. It may be admitted into evidence.

What is the number of it?

Mr. MACKENZIE. Government's Exhibit 4, your Honor.

Would you strike the ID, please?

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 4.)

Mr. MACKENZIE. I have no further questions of the witness, your Honor.

The COURT. Very well, have you anything further?

Mr. CLEARY. No, sir.

The COURT. All right, you may step down.

107 Mr. CLEARY. Excuse me, I would have to ask the interpreter—

CROSS EXAMINATION

By Mr. CLEARY:

Q. You don't know what the Spanish word for "appointed" means? In other words, right to appointed counsel.

A. Yes, I think so.

Q. Could you relate—

A. You mean on the form there?

Q. No, I want the Spanish word for it.

Do you remember the Spanish interpreter's word for the word "appointed"?

A. The statement on the form there, the word is "porporcionado".

Q. (Reading:)

If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.

Do you know what the Spanish phrase for that is, or what Spanish word the interpreter used?

A. Well, I could read it off of the form there, which would— which is what we usually do—

Mr. MACKENZIE. Your Honor, we object to this.

108 By the WITNESS:

A. (Continuing.) Rather than trust my memory.

Mr. MACKENZIE. Our next witness is going to be the interpreter in this case.

The COURT. All right, then he can ask him and enlighten all of us. I would like to know too.

Mr. CLEARY. No further questions.

The COURT. All right, you may step down.

(Witness excused.)

Mr. MACKENZIE. The Government would like to call Mr. Wimer now.

The COURT. Yes.

Albert Wimer, called as a witness herein for and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MACKENZIE:

Q. Would you state your name, please?

A. Albert Wimer, W-i-m-e-r.

Q. Mr. Wimer, what is your occupation?

109 A. I'm a professional, an official Spanish interpreter for the Immigration Service.

Q. Mr. Wimer, how long have you been so employed?

A. For the last four or five years.

Q. Mr. Wimer, calling your attention to November 20, 1968, did you have occasion to act as official interpreter during the examination of one Dimas Campos-Serrano?

A. To be honest with you, sir, I don't remember the date, but I remember the face of the defendant here.

Q. You say you see Dimas Campos-Serrano present in the courtroom?

A. Yes, sir.

Q. Would you point him out?

A. The last man there, sitting at that table.

Mr. MACKENZIE. Would you let the record reflect—

The COURT. It may reflect that he identified the defendant.

By Mr. MACKENZIE:

110 Q. Mr. Wimer, I show you Government's Exhibit 4, purporting to be the sworn statement of Dimas Campos-Serrano and ask you whether or not you have ever seen that before.

A. Yes, I have.

Q. Did you at the time this statement was taken act as interpreter?

A. Yes, sir.

Q. And did you translate the questions that were propounded by Mr. McLennan into the Spanish language, present them to the defendant to the best of your ability?

A. Yes, sir.

Q. And did you then transcribe the questions and answers that were made during that inquiry?

A. Yes, sir.

Q. Does your signature appear on this document?

A. Yes, sir, my signature is affixed to this document as witness and also as an interpreter in the Spanish.

Q. Did the defendant Dimas Campos-Serrano sign this statement in your presence?

A. Yes, sir, he signed this statement in my presence after I read it, the whole statement, to him—word by word,

111 page by page, all the way down to the last page, in Spanish.

Mr. MACKENZIE. Thank you very much.

The WITNESS. And that's why he put his initials at the bottom here, after I read each page, and pages where there was any correction to be made, it was marked on this statement.

The COURT. Very well.

The WITNESS. According to this there was no corrections in this statement.

Mr. MACKENZIE. Thank you, I have no further questions.

CROSS EXAMINATION

By Mr. CLEARY:

Q. I would like to you to read at this time a sentence in the warning, appearing on Government's Exhibit 4, which says:

If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.

A. In the Spanish, huh?

Q. In Spanish, slow and loud.

A. (The following answer was given by the witness in Spanish.)

112 Q. Mr. CLEARY. Could I have just one moment with my interpreter?

The COURT. Yes, of course.

By Mr. CLEARY:

Q. You have also used another phrase: "Do you wish to have a lawyer or any other person present to advise you?"

A. (The following answer was given by the witness in Spanish:)

113 Q. And did the defendant answer any other response other than the simple word "No"—was there any other words that he used?

A. No, sir. If he said any other words it would be written there in English.

Q. During the statement, at any time, in Spanish, did you mention to the defendant or did the defendant mention to you any statement that he had previously made to any immigration agents?

A. No, sir. As I said before—

The COURT. No, no, wait. You must wait until he asks you a question.

By Mr. CLEARY:

Q. On the question on the bottom of page 5, where you asked:

Did the officer ask you any questions about this mica? And the answer was:

After they examined the mica they told me this was a false mica:

And the question:

Did the officers ask you the date on which you entered the United States?

A. Yes, and I told them I entered "through Laredo, 114 Texas, on March 17, 1965."

Was there any words in Spanish or any context in Spanish that would indicate when he told the officers that he entered at Laredo, Texas?

A. Sir, if there had been something else besides that it would have been written down.

The COURT. So your answer is no, is that it?

The WITNESS. I imagine that's the answer, your Honor.

The COURT. Well, he asked you if there was any other phrase and you said if there had it would have been written down. I want to make sure it's "No".

Mr. CLEARY. I have no further questions of this witness, your Honor.

The COURT. Very well, you may step down.

Thank you.

(Witness excused.)

The COURT. Anything further?

Mr. CLEARY. I would hope that the Court would give me just a few moments to summarize my argument on the 115 various—

The COURT. Well, I will not let you do it this afternoon. I have two pretrials set here and I have two criminal cases set for trial tomorrow, so that you can come in here on—look at your book there on Thursday, Mr. Johnson—and I want all of the exhibits, unless you are going to use them in your argument.

Mr. CLEARY. Your Honor, I think I have a copy of almost all of the exhibits, except Exhibit 3.

The COURT. I would like to examine them.

How about Thursday?

The CLERK. Thursday is all right.

The COURT. Thursday morning at 10:30.

Mr. MACKENZIE. Your Honor, I have a grand jury session at 10:30. It has been set for several weeks now.



The COURT. What do I have at 2:00 o'clock?

You will be through by then, won't you?

Mr. MACKENZIE. Yes, sir, it's an hour and a half session.

The COURT. Two o'clock, and you will have fifteen minutes apiece.

Mr. CLEARY. It won't take longer than that, sir.

116 The COURT. All right, sir.

Mr. CLEARY. Your Honor—

The COURT. Yes?

Mr. CLEARY. With permission of the Court, one thing I would like stipulated among counsel, if I can save the requirement, that at no time was this defendant taken before the U.S. Commissioner on this matter. I checked with the Commissioner—

Mr. MACKENZIE. The Government will so stipulate, your Honor.

The COURT. I was going to ask the question, but then I thought I would wait until you got into your final arguments; but it is so stipulated that he was not taken before the United States Commissioner at any time, but went directly before the grand jury.

Mr. MACKENZIE. That's right, your Honor.

The COURT. Very well, let the stipulation be reflected in the record.

All right, this Court will stand adjourned until tomorrow morning at 10:00 o'clock.

(Which were all of the proceedings had in the within matter on the day and date herein.)

1. In the United States District Court Northern District of Illinois Eastern Division

No. 68 CR 732

UNITED STATES OF AMERICA

vs.

DIMAS CAMPOS-SERRANO, DEFENDANT

Transcript of Proceedings had in the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States

Courthouse; Chicago, Illinois, on Thursday, February 6, 1969, at the hour of 2:00 o'clock p.m.

Present: Hon Thomas A. Foran, United States Attorney, by Mr. D. J. Mackenzie, Assistant United States Attorney, on behalf of the Government; Mr. John J. Cleary, on behalf of the defendant.

Also present: Mrs. L. W. Hurney, District Director, U.S. Immigration and Naturalization Service.

2 The CLERK. *United States of America v. Dimas Campos-Serrano*, 68 CR 732.

Mr. CLEARY. Good afternoon, your Honor.

Mr. MACKENZIE. Good afternoon, your Honor.

The COURT. Good afternoon.

Are you ready to proceed, Mr. Cleary?

Mr. CLEARY. Yes, your Honor.

At this time, your Honor, with the Court's permission, I would appreciate taking advantage of the summing up on the weight of the various motions we have filed in the matter.

The COURT: Yes, please do.

Mr. CLEARY. The various motions filed by the defendant consist of a motion to suppress the evidence as a result of the search and seizure of the apartment located at 2159, I believe, California, where the defendant was arrested, and a motion to suppress the confession on the grounds of the lack of probable cause and the failure to give the adequate warning under the circumstances.

The evidence introduced on behalf of this defendant on the motion consisted of the three Immigration and Naturalization Service agents most connected with the offense. The defendant

3 requested that he be given time or the opportunity to locate two critical witnesses—he doesn't have the funds to do so—the witnesses Rico and Ortiz, who have since been transported to Mexico, and that request was denied, and in his own behalf introduced only his own testimony.

The contention of the defendant is that the Immigration and Naturalization Service agents took out a task force arrest. This arrest was planned a day in advance, when adequate opportunity could have been made to secure an appropriate arrest warrant, if deemed necessary; or in the alternative appropriate search warrant if certain quarters were to be examined.

These agents proceeded out, eight of them as we heard, and during the day, although he didn't know how many persons were scheduled to be taken into custody, fifteen to sixteen were in fact arrested, detained, physically restrained of their liberty, taken into custody as a result of this particular procedure.

One of the ones in the early morning hours, at 8:00 o'clock, at the Roulon Corporation, was Mr. Rico. Mr. Rico was arrested at his place of employment.

4 Now, we hear, through the statement of the INS, which I contend, although the competency the Court has ruled on, the question of self-serving, that they wanted to give the man the opportunity to get his clothes, and thereby proceeded to where he was residing on the Southwest side of Chicago and California Avenue.

There they gained entrance to the apartment.

Now, the Fourth Amendment as we know is no longer limited to physical or geographic circumstances. The issue protected against the Fourth Amendment is the right of privacy, and within a multiple apartment we have certain zones of privacy of certain defendants.

I would dare say that this question about looking for clothing would raise one's eyebrows as to the consensual aspects involved, especially when we heard from the agents no detailed circumstances as to the type of building that they secured. It raises grave doubts that they were so overwhelmed with this beneficial interest of the defendant that they had to follow him out into the apartment to do these types of things.

5 The first entry was taking place. The defendant was examined. A man went up to him—I'm an INS. Did he have any type of suspicion? Sure, he had suspicion. One of the roommates there was a man who had already been arrested for illegally being in the country, and to apply an old cliche, birds of a feather kind of flock together.

He walked over, and the defendant raises no question now other than how did he get into that apartment. The defendant contended and testified on the stand, he didn't consent to him coming in. He only consented to his friend.

Could the man have asked that the friend pass out the clothing from the apartment? Was it necessary for the agents to go in? We don't know. That wasn't in the hearing. This Court doesn't have that evidence as to that particular aspect.

of consent. We know that this defendant didn't consent to the intrusion of the investigators. Once in, they identified themselves.

Discounting the place now, they asked him to produce it. We are not challenging at this time the statute under which 6 these men have a right to examine people as to their nationality. All we are saying is that he did ask.

An experienced agent examined the alien registration receipt card. He was not, so to speak, uninformed or naive. He further asked for the social security card, and he even went further and said, "Where is your passport,"—inquired about that.

He accepted the explanation of the defendant; he examined them.

We hear some talk about the lighting condition involved. The agent, I believe, passed it to his fellow agent. In any event, an experienced agent looked at these particular documents, found them satisfactory because he then departed, went out of the apartment, back down into the street.

There we have the encounter with Mr. Ortiz, another tenant. Of course, as they pointed out, the agents did not know he was from the same apartment, but he sure knew what apartment he was coming from when they moved back into the same area.

What did the agent very honestly say. Agent Burrough?

He said, and I think he said it very well, we caught one fellow, Ortiz, with a bad card, and we're not in a position really, now, to go into that arrest under the Wong Song Doctrine as being an improper arrest because we don't have the man arrested, Mr. Ortiz, whom we requested; but, we just have to work with that circumstance.

He had this mind, this orientation we might call, using the language of Escobedo, focusing on a certain defendant—if one man is in that room had a bad card, another man might. He then walked up into the room, when he's in there and he says, "Let me see your card."

When he asked for that card, what becomes critical? What was the nature of my motion at this time, the motion to suppress, and on the warning requirements? The question turns on the Schmerber Doctrine, *Schmerber v. California*, on testimonial evidence—we know they could have probably required the man to give certain blood samples, physical requirements, whatever it might be, once taken into arrest.

But at this time, when we had narrowed it down to this particular man, this defendant, they said, "Produce a card," 8 a card that he thought was in fact altered, or in some way damaged, because he just arrested his roommate who had an altered card.

He then takes that card—

The COURT. Now, you are misstating it a little bit. The defendant handed the card to him, didn't he?

Mr. CLEARY. I think he asked for the card, your Honor.

The COURT. All right, supposing he did, under the inquiry, under the Act he'd have a right to ask him, but he didn't search him.

Mr. CLEARY. No, he didn't search him.

The COURT. All right.

Mr. CLEARY. In that particular sense at that time.

The COURT. All right, go ahead.

Mr. CLEARY. He asked for the card, and my contention is before—once he had the orientation of mind that this defendant, in fact, possessed a document that was altered, false, or in some way the possession thereof constituted a criminal offense, he should have warned him that the production of this particular card, being testimonial nature, not just merely 9 physical, that that would violate his privilege against self-incrimination, and by failing to so warn him, they obtained that card in violation of the Fifth Amendment.

The COURT. Would you say that would be true, counselor, in the event that a police officer asked me for my driver's license on a probable violation of the traffic laws, and I gave him the card, but knowing that the card that I had was false—would you say that that would apply in that case?

Mr. CLEARY. No, sir, and it is rather obvious, and the reason I think it is rather pertinent in this case—and I appreciate your Honor—

The COURT. No, I would like to know.

Mr. CLEARY. No, it is very excellent, your Honor. In fact, you are putting the finger right on my point, and there is a big distinction in that case.

If I was a police officer and I go up to your car, I have a right, once you are on the highway, to go up to you and ask you because I am arresting you for speeding or whatever else the case might have been, hence you are required to produce 10 your license.

But if, for example, an individual told me that that person driving that car had a false and altered vehicle registration, and I had reason to believe that you had in your possession a false driver's license, which is an offense against the law of the State of Illinois, and if I were to walk up to you and I would say, "Let me see your driver's license," which under ordinary circumstance might be permitted, I think, and the law would require, knowing these particular circumstances, I am securing evidence against you for a criminal offense, possession of the card.

The COURT. You are taking the position then that he had been advised that the card had been false?

Mr. CLEARY. Yes, sir.

The COURT. All right.

Mr. CLEARY. And I say in this case the same circumstances exist because the agent in this case had good cause—in fact, this was the reason for conducting the inquiry because he was the same agent that was present when the other agent examined the card, and again the idea that the circumstance arises 11-12 is that the other experienced agent had given this man—in the language of the streets—a pass, so to speak, and had come back to overcome the *prima facie* presumption of the experience of the other officer.

Once the card is presented then the question turns on the, I think, the issue as to the concession. Here I think the procedural aspects shift under *Miranda v. Arizona*, where the heavy burden is then placed upon the Government to show, one, the warning in detail given, and, two, the requirements as to the waiver—heavy burden, I think is the language of the opinion—so that the two-aspect offense, the first question as to the warning, we have a conflict as to fact which your Honor is going to have to resolve, and that is the question as to where the incriminatory statement was given.

The defendant contends the statement was given in the apartment. He said he told him when he examined him at that time. The agent, on the other hand, say it was not—the first incriminatory statement was given once he was taken into the vehicle, and they indicate—and again I think it is important to note—the manner in which these rights were given. Substantial constitutional rights were given, and I asked this in my line of questioning to make sure the Court would be informed of it, as they were walking down the stairs out to the

ear, and also the fact that we know this particular agent was not a native Mexican, even though he did demonstrate the warning in Spanish to the Court, and he went with a certain amount of precision. One can imagine without too much difficulty what was taking place—walking a man down, a foreigner, speaking in a different language to the man, even though speaking in Spanish, conveying to him the nuances connected with the constitutional rights, one, the right to remain silent; two, anything to be said can be used in a court of law against him. He went on in great detail in his warning to point out administrative proceeding; three, the right to counsel; and four, that counsel would be made available, and even further as the requirements

of Miranda go, counsel would be present during any interrogation, and from that, I would say cursory warning,

14 did the defendant fully understand that at the time they were talking to him in the vehicle that he had the right to have the assistance of free counsel present, and, of course, his indigency has been since demonstrated, and that is why I serve now as appointed counsel. The question is, I think it raises some serious doubt.

Number two, the warning we heard left out one important aspect, I believe, and again the Court overruled me on this, only the court reporter has it down, but I don't believe that the warning, as stated to us by the agent in English, made reference to the right of appointed counsel. He said you have the right of counsel, but it didn't make reference to free counsel, and again I have to leave it to the record on that particular point.

The defendant got on the stand and he was available for any type of cross examination the Government so chose. We put him up there, tendered him to see what type of understanding he had as to the warning.

He said, "I made a statement."

15 There is no question he made the statement at the Immigration office. The question is, of course, the understanding of his particular right—a rather detailed statement.

A point contended by the defendant in this particular matter is that if the incriminatory statement came out at an earlier stage, prior to the adequate Miranda warning, then any subsequent action would be wiped out. This is the cat-out-of-the-bag theory.

I think Wong Song is the doctrine about the tainted evidence, fruit of the poisonous tree, that if the prior warnings were inadequate the incriminatory statement having been made, unless there was some type of intervening circumstances—I think I brought out there was no statement by the agent that prior incriminatory statements would be of no value for use against him.

I think further another aspect to be considered on the motion was the fact that we have here a simple offense. I am not one to overemphasize the legal ease of the circumstances.

when we consider from the viewpoint of an agent, The
16 wrong done was an altered false alien registration card.

We have some contention, at least in the briefs of counsel, that this was not the offense for which he was arrested, there were some other offenses. He was arrested for only one thing, and if the Government, accepting their contention at this time that it constituted an offense of 18 USC 1546, under Rule 5, and under the Immigration Law itself, under the statute itself, Immigration Title 8, this man must have been immediately brought before, without reasonable delay, before the U.S. Commissioner. The Commissioner is on the 24th floor.

Where did they bring the man? They brought the man to this very same building but didn't bother taking him to the Commissioner so that he could be apprised of his rights.

The COURT. When was this statement made, November 20 or 21 of 1968?

Mr. CLEARY. There were two statements. The written statement was made on the 20th.

The COURT. That's what I am talking about.

Mr. CLEARY. The written statement was made
17 on the 20th, a day after the actual apprehension—in fact, approximately 26 hours because it was executed 2:30 p.m. on the 20th. He was arrested, I believe, in the morning hours of the 19th.

The defendant was brought to a building where he could have been afforded these rights, where he could have gotten, so to speak, to the heart of the matter at an earlier stage.

Here he is without counsel, and the question is the following day when examined at this Immigration hearing—I am not contesting the right of the Immigration people to hold this hearing. I think they have a perfect right to hold this hearing.

I am just saying when they plan to charge a man with a felony violation, they should first bring him before the Commissioner and then follow through on their administrative proceedings, whatever they might be.

I would like to sum up by saying that the question here is that we had a case where there was absolutely a warrantless search. There was no warrant whatsoever.

The question is, when they arrested Mr. Ortiz and 18 they went back into his apartment—I don't know exactly, and I can't spell it out on this time spectrum, precisely where it was, whether it was two feet outside of the apartment or when they were knocking on the door, but at that time that agent said, we got one man from that apartment with a bad card.

What should he have done? Should he have gone in on his clothes and examined him, or should he obtain a search warrant?

I am saying that unless you have unequivocal, clear and unrenounced consent—I mean even specifically, almost to going to the defendant to enter that apartment, there should have been no entry without a search warrant.

I think the most recent cases emphasize over and over again the privacy—and I knew what they were going in to talk to him about—and again, the agent couldn't tell us what type of clothing, if they are doing this particular personal type of service to a defendant.

There was no warrant to do this, and I cannot say that the 19 Government has any justification by consent. They can't certainly call it a search incidental to an arrest because they made the arrest of Mr. Ortiz out in the street, and I think that is somewhat expanding it. I can't see the other exigent circumstances.

I know counsel cited *Terry v. Ohio*. That is a protective search, and if they frisk my man down for a knife, a .45, a blackjack, a stiletto, I say go to it, I'm for it every day of the week. I don't believe federal agents should be unnecessarily killed.

On the other hand, I do not feel federal decisions should be overextended because of circumstances to which they do not apply.

One interesting note by Justice White in his concurring opinion in *Terry v. Ohio*, he says, "We have to be very care-

ful—" and I can't quote the exact language—maybe I can, if the Court would permit.

The COURT. Yes.

Mr. CLEARY. It is a short phrase.

This is by Justice White, 392 U.S. 1, page 34:

Of course, the person stopped is not obliged to answer.
20 Answers may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation.

In the opinion here was that when the agent went up there suspecting this particular thing, he had no right—if he thought he had these grounds he could go before the Commissioner and get an arrest warrant and accompanying search warrant, if he deemed it appropriate.

However, with the arrest warrant we know he could have gained access to the apartment to apprehend the individual. He didn't do it. There was no proper intervention, supervision of an impartial judge, commissioner, as the case might be, under the new law a magistrate, to superintend the requirement of probable cause, to protect this man's limited rights and to provide the privacy he had in this multiple dwelling apartment, limited though it might be, humble though the circumstances might be. He was entitled to this protection, notwithstanding the rather collective procedures used by the INS.

21 Now, the question as to waiver of rights, we have a man with limited background. The Court had a chance to observe him on the stand. He does not have the facility—I believe the confession, the document entered into evidence by the Government, points out he has no prior criminal record so as to be, so to speak, informed of these procedures, to know what the police status is, confronted by authority in a strange land, and charged with a most serious felony offense—what was facing him should there have been certain warnings given—were those warnings, in fact, in detail given so that he fully understood them, and having fully understood them that he intelligently and knowingly waived them. I say the whole circumstances here show no adequate waiver of any right and cast grave suspicion as to whether or not any adequate warning was given.

For these reasons we move to suppress the written confession as a result of the prior oral incriminatory statements for which

no adequate warnings were given, which under the circumstances appear almost to be coercive.

22 Also, we move to suppress the alien registration receipt card on the grounds that the agent knowing that this was testimonial evidence, having reason to focus in and suspect the defendant, asked for its production, knowing full well that it could in fact incriminate this defendant, and also further to suppress any other evidence they might have taken as a result of this unlawful arrest.

Thank you very much, your Honor, for your kind attention.

The COURT. Mr. District Attorney, do you have something to offer?

Mr. MACKENZIE. Your Honor, prior to commencing my oral argument, the Government would like to offer into evidence Government's Group Exhibits Nos. 5, 6 and 7, for identification.

Group 5 consists of the certified copies of the application for the order to show cause, for the order to show cause and notice of hearing. It contains a certified copy of the warrant for arrest of alien. It contains a copy of notification of bond pending determination of deportability.

Government's Group Exhibit 6, for identification, consists of certified copies of the special inquiry officer hearing worksheet and the decision of the special inquiry officer.

Again, both these exhibits are in relation to the defendant's deportation proceedings.

Finally, Government's Group Exhibit No. 7, for identification, consists of certified copies of the Immigration records of Dimas Gloria Vargas Garcia, who is in fact the authorized holder of Alien Registration Receipt Card No. A-14713099. Included in this file is her application for status as a resident alien and her application for a new alien registration receipt card.

The COURT. Let counsel examine the exhibits. Give him a chance.

Mr. CLEARY. There is one question, your Honor, I have as to certain of these documents, and I don't want to unduly delay the Court's consideration of the matter.

The COURT. That is all right.

Mr. CLEARY. But it indicates, for example, the warrant in Government's Group Exhibit 5, for identification—it has

Mrs. Hurney's signature, L. W. Hurney, "Witness my
24 hand and seal; 19th day of November, 1968, at 9:00 a.m.

The COURT. Is that the certification of the group document?

Mr. CLEARY. No, this is the—

Mr. MACKENZIE. This is the signature—

Mr. CLEARY. —of a warrant for the arrest of the alien. Unless Mrs. Hurney was psychic, I don't believe this document is—

The COURT. What date does it bear?

Mr. CLEARY. 19 November, 9:00 a.m., when they were arresting Mr. Rico on 19 November 1968, about 9:00 a.m. In fact, they didn't accomplish the arrest of the defendant Campos-Serrano until about 11:00 o'clock in the morning, and the thing that raises some doubt in my mind is if they had a warrant out for him that puts a completely different complexion on the case.

The COURT. When was that document signed?

Mr. CLEARY. It says, "Witness my hand and seal 19th day of November, 1968, 9:00 a.m., and Mrs. Hurney is here, maybe she would want to comment on it. It's just a question, on its face it appears to be patently inconsistent with the other evi-
25—dence offered by the Government. I'd have to move that it be excluded.

Mr. MACKENZIE. Your Honor, it is not inconsistent. If necessary, we can call witnesses to show that Mrs. Hurney was called by the agent who gave her a list of—if you recall, Agent Jacobs said he went to the vehicle and asked the defendant what his real name was.

The COURT. I will permit the document to come in at this time, subject to further evidence as to authenticity.

I believe you are offering it under what, Title 8, Section 1033, is it?

Mr. MACKENZIE. Yes, your Honor.

The COURT. Is that correct?

Mr. MACKENZIE. All these documents have been certified here.

The COURT. Well, I mean, that may be so, but we don't permit indirectly what you cannot do directly by merely having it certified, and something may be erroneous or hearsay.

Now, I will accept it at this moment, subject to your right—

I am going to reserve, for your information, my ruling 26 on his motions until you present whatever you want to present on the motion to suppress.

Mr. CLEARY. At this time, your Honor, I would also technically object on the grounds that the custodian has not testified as to the ordinary and necessary business records.

The COURT. He doesn't have to under the certification by a department of the Government under Title 8, I think Section 1033.

Mr. MACKENZIE. It's 103, I believe, your Honor.

The COURT. The other section is Title 18, where it's made in the ordinary course of business. Mr. Cleary, I think you'll find that to be correct.

Do you have all these exhibits, Mr. Cleary?

Mr. CLEARY. I'm sorry. I've just gone through 6. I haven't got to 7 yet.

The COURT. Very well, we will recess for a few minutes to let you look through them. It shouldn't take you more than five minutes.

Mr. CLEARY. No, sir.

The COURT. I will be back at quarter to 3:00 promptly.

27 (A short recess was taken.)

The COURT. Mr. Cleary.

Mr. CLEARY. I just wanted to make one additional comment about this evidence, having looked at the statute involved, I think it's 8 USC 1103—

The COURT. 1103, I said 1003.

Mr. CLEARY. Yes, your Honor.

My contention is, although these would properly be authenticated for any deportation proceedings and would probably be even proper in any related activity to Title 8, the charge here involved is Title 18 and therefore I would say that Federal Rules of Criminal Procedure and the statutes pertaining to business records would be applicable, and not this section which is merely an authorization section to allow the Attorney General to, in the Code of federal regulations, announce this authentication procedure, and for that reason I would again restate my objection.

The COURT. Your objection may be noted of record, but at this time I will permit the document to be received.

(Said exhibits, so offered and received in evidence,
28 were marked, respectively, Government's Group Exhibits 5, 6 and 7.)

Mr. MACKENZIE. Thank you, your Honor.

The COURT. Do you have anything else, Mr. District Attorney?

Mr. MACKENZIE. Yes, your Honor.

Are you permitting the documents into evidence subject to the introduction into evidence in support of his original objection there?

The COURT. I don't get you.

Mr. MACKENZIE. Pardon me?

The COURT. I don't comprehend.

Mr. MACKENZIE. Are the documents, with the exception of the warrant that was objected to by the counsel for defendant, being allowed into evidence at this time?

The COURT. You are running your case, counselor, and this document was signed, apparently, according to your statement, as a result of the telephone call—

Mr. MACKENZIE. That's right, your Honor.

The COURT. Made out here in this building and from 29 the evidence that I have heard that the defendant was under arrest at the time that this warrant had been issued.

Mr. MACKENZIE. That is correct, your Honor.

Mr. CLEARY. Your Honor, I just—I don't know that information—

The COURT. Well, you tell me.

Mr. CLEARY. What I would like to do is call Mrs. Hurney to the stand, if I could, because it's 9:00 a.m., and I want to see what the agent says as to the time they were at the Roulon Corporation, from 8:00 to 9:00—

The COURT. Are you calling her as an adverse witness?

Mr. CLEARY. Well, in fact, if she wanted to make a statement explaining that I would accept that. I wouldn't even require the oath.

The COURT. Mrs. Hurney, do you want to make a statement on the warrant?

Mrs. HURNEY. Sir?

The COURT. Do you want to make any statement to the Court on the warrant, the circumstances under which it was issued?

30 Mrs. HURNEY. Your Honor, it is customary when an investigator takes an alien into custody, or a group of aliens, to telephone me or someone who has delegated authority and give him a description of the person or persons whom they

are taking into custody and procure authority to bring them into the office, because if they were not taken into custody it would be presumed that they would not show up.

Therefore, I do ask such things as who they are, what nationality they are, how they came in, et cetera.

In the case of Mexicans, of whom we have thousands, of course, I could not possibly, your Honor, distinguish between this gentleman and that gentleman.

The COURT. I understand, I just wanted an explanation; but, I want to read this warrant.

Mrs. HURNEY. May I say that when they do bring them in they then prepare that immediately and bring it up for my signature.

The COURT. This is on the basis that he was in the United States as an alien, is that correct?

Mrs. HURNEY. That is correct.

31 The COURT. Not under the basis that he had committed a felony at this time?

Mrs. HURNEY. No, your Honor. He was an alien illegally in the United States—

The COURT. I will accept the explanation—yes?

Mrs. HURNEY. He was an alien, as far as we know, illegally in the United States, because he is unable to show that he is legally here.

The COURT. Yes.

Mr. CLEARY. Could I ask Mrs. Hurney a few questions, your Honor?

The COURT. You may ask her, of course.

Mr. CLEARY. Do you remember the time on this document—9:00 a.m.?

Mrs. HURNEY. I couldn't possibly remember the time. This man was brought in with a large number of other aliens, and I could not possibly honestly say I remember the exact time.

Mr. CLEARY. Could it have been possible that this document could have been executed, say, in the afternoon of the 19th, rather than at 9:00 a.m., and pre-timed, or what you want to call it?

Mrs. HURNEY. That is most unlikely.

32 The COURT. Very well.

Mr. CLEARY. You have no recollection of who the agent was that called you on this particular case?

Mrs. HURNEY. I couldn't possibly say.

The COURT. Very well.

Do you have anything else, Mr. District Attorney?

Mr. MACKENZIE. No, your Honor, other than my argument, your Honor. I have no further evidence.

The COURT. All right, go ahead, sir.

Mr. MACKENZIE. Your Honor, the facts as testified to by the Immigration officers, Jacobs, Burrough and White, clearly indicate that the presence of the Immigration officers in the apartment of the defendant on November 19, 1968 was with the consent and at the request of Miguel Rico and Jose Rodriguez Ortiz, both men having requested they be allowed to return to their apartment to collect their belongings.

The permission to enter the apartment need not have been expressly given by the defendant herein. It is sufficient 33 if the permission or the consent to entry is given by co-tenants who had equal use and occupancy of that same apartment.

Additionally, the purpose of entry was not to search the premises, but rather to allow these two men to gather their belongings. This request was made by them and it was for their sole benefit.

The only inspection that was made by the agents was of the area that the men indicated they wished to obtain their belongings from, and it was made only as to a cursory examination to determine whether or not there were weapons present.

The facts as the agents testified were that they encountered the defendant Dimas Campos-Serrano both times, and that he was questioned concerning his rights to be in and remain in the United States.

The officers of the Immigration and Naturalization Service have this power to question, without warrant, any alien or person reasonably believed to be an alien, as to his rights to be in and remain in the United States.

This authority comes from Title 8 of the 34 United States Code, Section 1357, subsection (a), sub-section (1), and cases supporting the constitutionality of that statute, *United States v. Correa*—

The COURT. There is no question about that in my mind.

Mr. MACKENZIE. All right, your Honor, the presentation of the altered alien registration receipt card, Government's Ex-

hibit 1, in evidence, and the defendant's representation that he was a resident alien unlawfully in the United States, made in response to the Immigration officers' request for proof of the defendant's right to be in and to remain in the United States, without first being advised of his rights, did not violate the defendant's rights under the Fifth Amendment for the following reasons: First of all, the factual circumstances confronting the Immigration officers provided a reasonable basis for any suspicion that the defendant was an alien.

The officers had statutory authority to question any suspected alien as to his right to be in and remain in the United States.

During the course of a routine inquiry, without the
35 agents exercising any restraint over the defendant, the defendant voluntarily presented an alien registration receipt card as proof of his lawful status as a resident alien.

The COURT. Was this on the second visit or the first visit?

Mr. MACKENZIE. On both visits, your Honor.

The COURT. He was asked for the card?

Mr. MACKENZIE. That's right, your Honor.

The COURT. All right, go ahead.

Mr. MACKENZIE. As soon as it was determined the alien registration receipt card presented by the defendant was altered, this being the second—the return, the second visit to the apartment—the defendant was immediately taken into custody. He was advised in his own language of his rights.

Prior to his being taken into custody and advised of his rights, the defendant asserted he was a resident alien lawfully in the United States, and it was only after that he had been taken into custody and advised of his rights, his warnings given him, that the defendant subsequently admitted his true identity. This was testified to by Agent Jacobs that he approached the defendant in the car when they were stopped for gas
36 and asked him for his true name.

The COURT. Then again in the statement he admitted it, didn't he?

Mr. MACKENZIE. Yes, at the hearing.

The COURT. Then why wasn't he taken before a magistrate or a judge forthwith?

Mr. MACKENZIE. All right, your Honor, let me just jump to that point then.

The defendant's counsel here is laboring under the impression that the defendant's arrest was for a felony offense.

The COURT. No, I understand, and I do not buy that. I mean, this is the position and the concern of the Court. The officers here had a perfect right under the provisions of the law to take him into custody on the violation of the Immigration laws for being here illegally.

What I am concerned about is when the disclosure was made that he had a falsified card, which is a felony, and made it to the officers when they took him into the gasoline station, he then made it in a statement on November 20.

My question is, when the felony was disclosed to them
37 and he admitted it, this changed the status that there
was a felony, and why wasn't he brought to a magistrate
forthwith?

Mr. MACKENZIE. Your Honor, let me present this—it will require just a little—

The COURT. This is the point that concerns the Court.

Mr. MACKENZIE. It will require me to jump just a little bit ahead of my argument.

The COURT. Go ahead.

Mr. MACKENZIE. The Government's Exhibit 7 here is a file of the Immigration record of Dimas Gloria Vargas Garcia. After the apprehension of the defendant herein the Immigration authorities, using the number that they picked off of this document, which is Government's Exhibit 1, requested this file. It came, I believe, from the San Antonio office of the Immigration Service.

It was not until receipt of this file that a determination could actually be made that there was a criminal violation, or a possible criminal violation.

The COURT. You mean the admission of the defendant wasn't probable cause?

38 Mr. MACKENZIE. Your Honor, the admission of the defendant in the context of the proceedings that were going on—he had been advised of all of his rights, all of the warnings had been given him, bond had been set. The defendant was in an administrative proceeding.

The alteration of the card, the circumstances surrounding this, the procedure that the Immigration authorities followed, would require that some documentation, some proof as to this card, be submitted, and this is what the file—

The COURT. You know, say I am sitting here on a civil matter, and in the course of hearing that matter there is disclosed

by the evidence a crime, I can immediately declare that I am sitting as an examining magistrate and hear such evidence as I desire to do so, if a felony is disclosed in my presence, and I can do one of two things, either discharge them on the basis of the evidence or, forthwith, hold them to the grand jury.

The difference that bothers me and concerns me is that he was arrested for a misdemeanor by his being in this country without properly being here. The officers were advised of his admission prior to the time his statement was taken, and then in his statement there was a clear admission that this was an altered card. That's what bothers me. There is a Commissioner in this building, and he was not brought before a judge until December 16, which is nearly a month after the time a felony was disclosed.

Mr. MACKENZIE. Your Honor, he wasn't even arrested on a misdemeanor. He was arrested for violation of the Immigration laws. The failure—and I think this is of extreme importance, your Honor.

The COURT. Well, it's more civil in nature, I grant you that.

Mr. MACKENZIE. The failure to have in his possession a valid Immigration document—

The COURT. All right.

Mr. MACKENZIE. This is the key, that the proceedings that took place in the Immigration offices were an administrative proceeding.

The COURT. Not when a felony is disclosed to them.

Mr. MACKENZIE. Your Honor, I think that once 40 the—when the administrative—the statute provides for setting of the bond and for the detention of the defendant throughout the Immigration proceedings, and provides that the defendant may be held for criminal proceedings thereafter.

The COURT. Well, maybe so, but Rule 5(a), proceedings before a Commissioner, is contrary to what you state.

(b), it says: "An officer making an arrest—"

Mr. MACKENZIE. Your Honor—

The COURT. Just a moment now.

An officer making an arrest under warrant issued upon complaint or any person making an arrest without a warrant—

which is the case in this instance, although it had been issued for being in the country without a card—

shall take the arrested person without unnecessary delay before the nearest available Commissioner or before any other nearby officer in power to commit persons charged with the offenses against the laws of the United States—

41 You subsequently indicted this man for a felony.

Mr. MACKENZIE. Yes, your Honor, but this was after the Immigration authorities had in fact made a determination as to the card and—

The COURT. The administrative officer has no right under the law, and the courts have said this many times, that the administrative officer has no right to interject police officers, as they are referred to in one case which I cannot at the moment recall, to interpose their judgment for the independent judgment of a magistrate or a judge who may be sitting.

Mr. MACKENZIE. Your Honor, may I just—

The COURT. You may, of course. I will hear you out.

Mr. MACKENZIE. Under Title 8, Section 1252, apprehension and deportation of aliens, arrest and custody, provision (a) provides that:

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may upon warrant of the Attorney General 42 be arrested and taken into custody. Any such alien taken into custody may, in the discussion of the Attorney General, and pending such final determination of deportability be continued in custody or be released on bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe.

The COURT. I have no quarrel with that at all. They certainly have the right to do that.

Mr. MACKENZIE. I believe, your Honor, that the Immigration proceedings proceeded with dispatch, and they did so because of the waiver form that was signed by the defendant in this thing requesting an early hearing on this matter before Immigration authorities. This is contained in one of the documents in Defendant's Group Exhibit 5.

The COURT. They are not a judicial officer. There is a distinction, and they so said in Miranda, and they so said, I believe, in another matter, in other cases that I cannot at the moment recall.

43 Mr. MACKENZIE. The section that the defendant cites herein, your Honor, says that this is the power of Immigration officers and employees, and it states in Section 4—this is Title 8, 1357, subsection 4:

To make arrests for felonies which have been committed and which are cognizable under the laws of the United States regulating the admission, exclusion or expulsion of aliens, if he has reason to believe that the persons so arrested is guilty of such felony, and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest—

The COURT. There is no question about that. They have a right to arrest, and they have a right to arrest for he is here merely as an alien.

Now, step 2, if in the process of arresting him and detaining him, which they in my judgment have a perfect right to do under the code, they determine that a felony has been committed—this is the distinction—then they must with dispatch bring him before an examining magistrate, and that is the decision of the Supreme Court, and I will give you one that—I'm not cutting you off at all, you know, but when you get to these points I am trying to clarify them for myself.

In *United States of America v. Augusto daSilva Valente*, which is quoted at 155 F. Supp. 2d, at 577, wherein they had a similar situation here, and the judge in that case, who was Judge Aldrich, and this is a '57 case—there he said he had rendered an opinion which the Government had come in and asked to either be vacated or amended, in which he held they hadn't any right to do, which is similar to the situation we have here:

The Government takes exception to my earlier opinion—
meaning Judge Aldrich's opinion—

45 on the ground that the Immigration office had a right to arrest the defendant without warrant under subsection (a)(2), Section 1357, and interrogate him thereunder, and that if the defendant in the course of that examination chose voluntarily to admit something else, that was his affair. It points out that he was not arrested for a felony under subsection (a)(4). All this I assumed before.

Quoting Judge Aldrich further, he said:

It seems to me that one only has to state the Government's full position, and it answers itself. Before the defendant was arrested the Government knew he had committed the offense for which he is now being tried (if he ever did commit it), because the alleged statement had been made to the same Government employee who later arrested him. Of greater importance, at the time he was arrested the defendant immediately admitted that he was an alien, made no claim that he was properly in the country, and agreed that he should be deported. No lengthy examination—

And, of course, here we have him admitting that he was not only an alien, but that he was here with an altered card which of course makes it a very serious offense of being a felony.

46 No lengthy examination was needed, so far as subsection (2) was concerned. If the detention under subsection (2), and interrogation to obtain an admission in aid of a prosecution for a subsection (4) offense for which he could not have been detained, was not a deliberate subterfuge, the effect was the same. The result is not to be countenanced.

I feel that we have the same situation here and, therefore, the Court here will rule—

Mr. MACKENZIE. Your Honor, could I say—

The COURT. That the search—well, I know the facts. I've been given plenty of time to think about it. I have researched the law on it and insofar as the motion is concerned to suppress the evidence of the card as obtained in the apartment, that will be denied.

The Court is of the opinion that on request by the agents this was voluntarily given to them.

On the question of the confession and on the question of his admitting it in the car, that will be granted.

47 And the motion to dismiss will be denied at this time.

We will hear it upon the merits as to such evidence as the Government cares to produce.

Now, do you want a date, Mr. District Attorney?

Mr. MACKENZIE. Yes, your Honor.

The COURT. Mr. Cleary?

MR. CLEARY. Yes sir, I thought—possibly maybe I am a little bit presumptuous, but maybe even the case might be heard today?

THE COURT. No, I'm not going to. The Government is going to have to be given time to consider what—and you will also—I don't know how you will proceed. That is up to the District Attorney, but I am not going to push to a trial today, nor would I do that to you either.

MR. CLEARY. Yes, sir.

THE COURT. It is a '68 indictment, so I will put it over—it will only take probably a day at the most to try it.

MR. MACKENZIE. I would imagine, your Honor.

MR. CLEARY. Yes, sir, this was a waiver of a jury trial.

48 THE COURT. All right, this is the 5th day of February.

Put it in the last part of February, Mr. Johnson.

MR. CLEARY. My client is still in jail for lack of \$100, and I was hoping possibly in light of the Court's ruling today—

THE COURT. No, I am going to put it over until—we have a case that has nineteen defendants in it and it may not go on that particular day, so we will put you on the 24th of February, at 10:00 o'clock. That is the earliest day I can give you.

MR. CLEARY. Your Honor, will I be allowed to proceed at that time with questions on the poison fruit, so to speak, doctrine?

THE COURT. You proceed with your theory of your defense in this case on the merits, presenting such evidence and asking such questions as you so desire, and I will rule on them at that time.

MR. CLEARY. Yes, sir.

THE COURT. All right, adjourn the Court, Mr. Marshal.

(Which were all of the proceedings had in the within cause on the day and date herein.)

[U.S.C.A.—7th Circuit, Filed, May 23, 1969, Kenneth J. Carrick, Clerk.]

1 In the United States District Court, Northern District of Illinois, Eastern Division

No. 68 CR 732

UNITED STATES OF AMERICA

vs.

DIMAS CAMPOS-SERRANO, DEFENDANT

Transcript of Proceedings had in the trial of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States District Courthouse, Chicago, Illinois, on Tuesday, March 4, 1969, at the hour of 10:30 o'clock a.m.

Present: Hon. Thomas A. Foran, United States Attorney, by: Mr. D. J. Mackenzie, Assistant U.S. Attorney, on behalf of the Government; Mr. John J. Cleary, on behalf of the defendant.

Also present: Mrs. L. W. Harney, District Director, Immigration and Naturalization Services.

2 The CLERK: 68 CR 732, *United States v. Dimas Campos-Serrano*, for trial.

Mr. MACKENZIE. Good morning, your Honor.

Mr. CLEARY. Good morning, your Honor.

The COURT. Good morning, counsel.

Are you ready?

Mr. MACKENZIE. The Government is ready to proceed for trial.

Mr. CLEARY. The defense is ready to proceed at this time, your Honor.

The COURT. Very well, is the defendant here?

Mr. CLEARY. He is coming out now, sir.

At this time, your Honor, I would request the Court pursuant to Rule 28 of the Federal Rules of Criminal Procedure to appoint Mr. Wimer of the Immigration and Naturalization Service as interpreter to apprise the defendant Dimas Campos-Serrano of the nature of the proceedings and what takes place since Mr. Dimas Campos-Serrano only speaks Spanish.

The COURT. That motion is granted.

Mr. CLEARY. Thank you, your Honor.

The COURT. He may sit at the table there with you.

3 **Mr. CLEARY.** Your Honor, I think for the record he has previously been sworn.

Mr. MACKENZIE. Yes, he has.

The COURT. Yes, he has.

He may sit at the table there with you.

Mr. MACKENZIE. Your Honor, I don't believe any summary is necessary of the proceedings that have taken place to date.

The COURT. I don't think so.

Mr. MACKENZIE. Your Honor is familiar with them.

The COURT. Yes, sir.

Mr. MACKENZIE. We are ready to call our first witness.

The COURT. I heard the motion to suppress and I am familiar with it, so you may proceed with your first witness.

Mr. MACKENZIE. Thank you, your Honor.

Mr. CLEARY. At this time I would move to exclude any witnesses, other than usually the Government's request for a co-ordinating agent.

The COURT. All witnesses in this case are excluded and will leave the courtroom.

4 **Mr. MACKENZIE.** The Government will call as its first witness Mr. Clark Burrow.

Clark Burrow, called as a witness herein for and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MACKENZIE:

Q. Mr. Witness, would you please tell the Court your name, and spell it for the court reporter.

A. Clark Burrow, B-u-r-r-o-w.

Q. Mr. Burrow, what is your occupation?

A. I am an investigator for the U.S. Immigration Service.

Q. For how long have you been employed in that capacity?

A. Since April 1965.

Q. Mr. Burrow, calling your attention to the morning hours of November 19, 1968, what if anything occurred?

A. I had occasion to question an individual on the sidewalk in the 2200 block of South California, in Chicago, as to his citizenship.

5 Q. What if anything did you say to this individual?

A. I identified myself and questioned the individual, who I later learned was Rodriguez Ortiz. I questioned him as to his citizenship. He stated he was a citizen of Mexico and produced an alien registration receipt card.

Q. What if anything did you do then?

A. I examined the card and determined it to be altered, and Investigator White—Investigator Adolphus White came up to us at that time and he too examined the card and said that it was altered.

Q. What if anything occurred then?

A. Well, Mr. Ortiz was taken into custody, advised of his rights, and pursuant to his request Mr. White and I accompanied him to his apartment to collect his personal belongings.

Q. Do you recall where the apartment was located?

A. Yes, it was in the building at 2251 South California, in Chicago.

Q. Mr. Burrow, what if anything happened at the apartment?

6 A. Upon entering the—upon entering the apartment Investigator White and I encountered another individual.

Q. Can you identify this individual?

A. Yes.

Q. And do you see him present in the courtroom?

A. Yes.

Q. Would you please point him out?

A. Yes, it was the defendant Dimas Campos-Serrano.

Q. Can you indicate the individual?

A. Yes, in the blue coat.

Mr. MACKENZIE. Your Honor, may the record indicate that the witness has identified the defendant Dimas Campos-Serrano?

The COURT. It may so indicate.

By Mr. MACKENZIE:

Q. What if anything, Mr. Burrow, did you do next?

A. I identified myself and asked the defendant Dimas Campos-Serrano to state his country of citizenship.

7 Mr. CLEARY. Your Honor, at this time, based upon the pretrial proceeding along the same lines, I would appreciate the Court allowing me to assert the motions that I would have as to probable cause and warning re-

quirements after I cross examine the witness, rather than insert them at this time.

The COURT. You may do so.

Mr. CLEARY. Thank you, sir.

By Mr. MACKENZIE:

Q. Where did this conversation take place, Mr. Burrow?

A. In the living room of the apartment.

Q. Who else was present, if anyone?

A. Only us.

Q. Only yourself and Mr. — and the defendant?

A. And the defendant, yes.

Q. Will you tell the Court, please, what you said to the defendant and what in turn he said to you?

Mr. CLEARY. At this time I am going to move to object to this line of questioning because the Court has already ruled on this matter and granted my motion to suppress any statements or confessions of the defendant.

Mr. MACKENZIE. No, the statements that were suppressed were anything made after he had been advised of his rights. This is the preliminary questioning in the apartment itself, your Honor, as to his place of citizenship.

The COURT. Overruled.

Mr. MACKENZIE. This was not suppressed.

The COURT. I sustained it as far as the confession is concerned.

Mr. CLEARY. Well, I just want it noted that the point was that he had gone in there, as we know from the prior testimony, as result of the other individual —

The COURT. The record will so note, but your objection is overruled.

Mr. CLEARY. Thank you, sir.

Mr. MACKENZIE. Would you read the question to the witness again, please?

(The pending question was read by the reporter.)

By the WITNESS:

A. I asked the defendant to state his country of citizenship. He stated Mexico and produced an alien registration receipt card.

By Mr. MACKENZIE:

Q. Will you tell the Court, please, where he obtained this card?

A. From his wallet.

Q. Investigator Burrow, I show you what can be marked Government's Exhibit 1, for identification, being an alien registration receipt card, No. A14 713 099, and ask you whether or not you have ever seen that card before.

A. Yes, it is the one presented to me by the defendant Dimas Campos.

Q. After receiving the card what if anything did you do next?

A. I took the card into another room where there was more light, so I could examine it more closely. I examined the card, determined that even though the card contained the defendant's picture, it had been altered in that the name and sex had been erased and typed over.

Q. I want you to examine the card again, and would you indicate for the Court where on the card these alterations occurred?

A. Yes, in the first name and in the sex, as they appear on the date side of the card—identifying date side of the card.

Q. What if anything did you do then?

10 A. I showed the card to Investigator White, who examined it with his flashlight, and he said that the card had been altered.

Q. What if anything, Mr. Burrow, happened then?

A. Well, the defendant was taken into custody. He was allowed to collect his personal belongings and was advised of his rights.

Mr. MACKENZIE. The Government has no further questions of this witness.

The COURT. Mr. Cleary.

CROSS EXAMINATION

By Mr. CLEARY:

Q. Mr. Burrow, did you ever testify before in any proceeding before a grand jury in this matter?

A. No, sir.

Mr. CLEARY. Would the Government acknowledge that there is no proceeding containing any statement of the witness to the grand jury?

Mr. MACKENZIE. That is correct.

By Mr. CLEARY:

Q. Have you had occasion in the past to write any written reports or statements concerning the matters to which you now testified?

A. No, sir.

11 Q. You have never written a report on this matter?
A. No, sir.

The COURT. He has answered the question. There is no reason for you to repeat it, Mr. Cleary.

Mr. CLEARY. It seems rather incredulous, your Honor.

The COURT. That remark will be stricken from the record.

Mr. CLEARY. Yes, sir.

By Mr. CLEARY:

Q. On 19 November 1968, you were a part of a group known as—what was the name that you used at the last time you testified?

Mr. MACKENZIE. Your Honor, I object to this line of testimony.

The COURT. He can ask him, if he knows what he is going to ask him.

By Mr. CLEARY:

Q. I think in your last testimony you said it was a task force arrest of a series of aliens that you planned the prior day, the 18th of November, to arrest—or with a group of them.

12 Well, let's start this way: Who accompanied you on the day that you stopped and apprehended —

The COURT. Now, which question do we have before us?

Mr. CLEARY. Yes, your Honor, I would like to strike the first question.

The COURT. All right, strike it and start again.

By Mr. CLEARY:

Q. Would you state who accompanied you at the time that you arrested Mr. Ortiz Rodriguez—or Rodriguez Ortiz?

A. Investigator White, and Investigator Jacobs was also present.

Q. Prior to your arrest of Mr. Rodriguez Ortiz —

Mr. MACKENZIE. I object to that question, your Honor.

The COURT. I don't hear it yet, until he finishes it. Let him finish and then you make your objection.

Now, go ahead.

By Mr. CLEARY:

13 Q. Prior to the arrest of Rodriguez Ortiz had you been in the apartment of the defendant at 2251 South California?

The COURT. Now, what is your objection?

Mr. MACKENZIE. I object to that question, your Honor. There has been no testimony solicited from the stand on direct, on any prior entry into the apartment—the testimony dealt with the period starting with the arrest of Mr. Ortiz and I fail to see any materiality here in going beyond or behind this arrest for the purposes of this prosecution here.

The COURT. For the purpose of this trial?

Mr. MACKENZIE. For the purpose of this trial, your Honor.

The COURT. It was apropos on the motion to suppress, but I question very much if it is now.

Mr. CLEARY. The reason I think it is pertinent, your Honor, is the fact that surrounds the circumstances—surrounding his justification of going back into the apartment.

He had heard testimony as to using light, extra light in the apartment, so I think by inference there is an implication towards a prior time.

14 The COURT. Let's not belabor it. The objection is sustained. I heard it thoroughly. The man on trial here is the defendant, no one else.

Mr. CLEARY. I just want to state, your Honor, that I feel if there was an improper arrest of Mr. Ortiz, then of course the rest of the Government's case would crumble. I am using the Wong Song Doctrine.

The COURT. Well, you had that hearing.

Mr. CLEARY. Fine, sir.

Then I would presume, your Honor, all my previous motions made are now incorporated—my motion to suppress the confession?

The COURT. Yes, Mr. Cleary.

Mr. CLEARY. Motion to suppress the card as to lack of probable cause, for the arrest of Mr. Ortiz, the question as to the card—

The COURT. I don't think it is necessary for you to repeat them. They are incorporated into the record as you had previously stated in the hearing to suppress.

Mr. CLEARY. All right, sir.

15 Mr. MACKENZIE. And the Government's answer, your honor, will be incorporated also?

The COURT. Of course.

Mr. MACKENZIE. Thank you, your Honor.

The COURT. I don't mean to infer to you, Mr. Cleary, that you are cutoff from the question of the merits of this matter in any way.

Mr. CLEARY. Well, I feel somewhat strapped in, in the sense that—

The COURT. Well, there is no sense in being redundant about it. I mean as far as the motion to suppress is concerned, we have disposed of that.

Mr. CLEARY. I understand, but there is a nuance involved in this thing that is very important.

The COURT. A what?

Mr. CLEARY. A nuance.

The COURT. Yes.

Mr. CLEARY. And if I could point out to the Court what I specifically mean, I am objecting now specifically and I just want to clarify, as to any testimony of the defendant by word

16 or by set in giving this man a card, an alien registration receipt card, and I am objecting as to that particular

point, and I wanted to have some latitude to inquire as to what justification he had, so as to determine whether or not there should have been a warning so that at least even that—the walking up and asking for the card—I would even move to suppress that.

The COURT. Overruled.

By Mr. CLEARY:

Q. You asked the defendant to state the country of his citizenship, is that not correct?

A. What is correct.

Q. Did he give you an answer?

A. Mexico.

Q. Did you ask for any other card but the alien registration receipt card?

A. I did not—as I recall, I did not.

Q. Did you ask for the passport?

A. As I recall, the passport was asked for.

Q. At this time?

A. Yes, while we were still in the apartment.

Q. This is after the arrest of Mr. Ortiz that you asked for the passport from the defendant?

17 A. The card was examined and as I recall the passport was asked for.

Q. I am not concerned about whether or not it was asked for, I am concerned with whether or not the passport was asked for from the defendant after the arrest of Mr. Ortiz.

Q. That's sufficient.

The COURT. Well, now, just a moment, Mr. Cleary. Let the witness finish his answer.

Mr. CLEARY. I am just going to say it is unresponsive, and I would ask that it be stricken.

The COURT. Well, let me determine that, would you please? Did you finish your answer, sir?

The WITNESS. No, sir.

By the WITNESS:

A. (Continuing) After the card was examined, as I recall, the passport was asked for in that it contains other identifying data that would better—that would help us to identify the subject.

By Mr. CLEARY:

Q. Well, you just got done saying—

18 Mr. CLEARY. And I am again—I don't like to unduly repeat the question, your Honor, but I would like to make it very clear that I am referring—and this is why the Court foreclosed me from bringing out the fact that he had a prior contact with the defendant—

By Mr. CLEARY:

Q. At this time, that is at your contact with the defendant after the arrest of Mr. Ortiz, did you ask for the passport in addition to the alien registration receipt card?

A. Well the arrest came after the passport was asked for.

Q. I understand that—I am asking for after the arrest of Mr. Ortiz on the sidewalk, and you then reentered into the apartment at 2251 South California, and you then asked for the card—and at that time did you request to see the passport?

Now I am not concerned about any time prior to that, whether or not the passport was asked for—I am only concerned with this latter time.

Mr. MACKENZIE. Your Honor—

The COURT. He may inquire.

19 Mr. MACKENZIE. I make one objection to Mr. Cleary's characterization that the witness stated that he asked for the card. The testimony from the stand indicated that the card was presented, that he merely asked the individual his place of citizenship.

The COURT. You have a question pending?

Mr. CLEARY. Yes, sir.

The COURT. All right, do you remember it, sir?

If you do, I don't:

Mr. Reporter, would you please read it?

(The pending question was read by the reporter.)

By the WITNESS:

A. Yes. As I recall, that is right.

By Mr. CLEARY:

Q. At that time did you ask to see the defendant's social security card?

A. As I recall, no, sir.

Mr. CLEARY. I want to ask the question, "Did you ask to see the passport twice and the social security card only once," but it goes back to the prior transaction—

The COURT. Why don't you ask him and let me rule on it?

20 Mr. CLEARY. All right.

By Mr. CLEARY:

Q. Did you ask to see the passport on two different occasions and to see the social security card on only one occasion?

A. As I recall, no, sir.

Q. Did you in fact see the passport?

A. No, sir.

Q. Did the defendant offer any explanation as to the whereabouts of the passport?

A. As I recall, only that the passport had been sent to Mexico.

Mr. CLEARY. May I see Government's Exhibit 1, please?

By Mr. CLEARY:

Q. I am now showing you Government's Exhibit 1, for identification, and at what time precisely did you notice those two alterations to which you have previously testified—that is, the name and the sex?

A. Do you mean the time of the day or—

Q. Just in reference to your conversation with the defendant the second time.

A. Upon entering the apartment, well, identifying
21 myself and asked the defendant to state his country
 of citizenship—he said Mexico. He presented me with
 this card—I immediately took it into another room and ex-

amined the card and saw that it had been altered, and that it had erasures and typed-over.

Q. Did you make this determination prior to or after your consultation with Investigator White?

A. Prior to.

Q. At the time you took the defendant into custody did you contact any other Immigration official?

A. Investigator White was present.

Q. Did either you or Investigator White contact any other Immigration official, to your knowledge?

A. At the time, no sir, as I recall.

Q. Do you remember now, in the morning hours, at what specific time did you take the defendant into custody?

A. As I recall, it was approximately 9:00 o'clock.

Mr. CLEARY. Nine o'clock. I have no further questions of this witness, your Honor.

The COURT. Thank you.

22 Anything on redirect?

Mr. MACKENZIE. No, your Honor.

The COURT. You may step down, sir.

(Witness excused.)

Mr. MACKENZIE. The Government would now like to call Inspector White as a witness.

Adolphus D. White, Jr., called as a witness herein for and in behalf of the Government, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MACKENZIE:

Q. Mr. Witness, please tell the Court your name and spell it for the court reporter.

A. Adolphus B. White, Jr., A-d-o-l-p-h-u-s W-h-i-t-e.

Q. Mr. White—Investigator White, what is your occupation?

A. I am an investigator for the United States Immigration and Naturalization Service.

Q. How long have you been employed in that capacity?

23 A. Approximately eleven and a half years—or correction—as an investigator for two years and nine months.

Q. Investigator White, calling your attention to the morning hours of November 19, 1968, what if anything occurred?

A. I was sitting in a parked Immigration vehicle in the 2200 block of California Street and I observed Investigator Burrows approach an individual on the sidewalk and questioned him.

Q. What if anything did you do then?

A. I got out of the car and went over to Mr. Burrows to see if I could be of any assistance.

Q. What if anything happened then?

A. Mr. Burrows showed me an alien registration receipt card that the individual had presented him and asked my opinion.

Q. What if anything did you do?

A. I examined the card and found that it was altered.

Q. Investigator White, what if anything happened next?

A. We took the individual who we later found to be 24 Mr. Rodriguez Ortiz into custody, advised him of his rights and he requested that he be allowed to return to his residence to obtain his clothing and personal belongings.

Q. Investigator White, do you recall where that apartment was located?

A. Yes, sir, it was 2251 South California. It was on the ground floor; it was in the rear of the building.

Q. And what if anything happened at the apartment?

A. As we entered the apartment Investigator Burrows and I encountered another individual.

Q. Can you identify that individual?

A. Yes.

Q. Do you see him present in the courtroom?

A. Yes, sir.

Q. Would you point him out, please?

A. Yes, sir, he is the defendant, Mr. Serrano.

Q. Would you please be more specific?

A. Yes, sir, that is the individual we saw at the apartment, the defendant.

Q. Which one?

A. Dimas Campos-Serrano, in the blue jacket.

Mr. MACKENZIE. Thank you.

25 Your Honor, may the record indicate that the witness identified the defendant Dimas Campos-Serrano?

The COURT. It may so indicate.

By Mr. MACKENZIE:

Q. What if anything happened next?

A. I accompanied Mr. Rodriguez Ortiz to get his clothing and belongings, and Investigator Burrow questioned the defendant.

Q. What if anything occurred after that?

A. Investigator Burrow brought to me an alien registration receipt card which he indicated that the defendant had presented to him, and asked my opinion on it.

Q. Investigator White, I show you what has been marked Government's Exhibit 1, for identification, being an alien registration receipt card, No. A14 713 099, and ask you whether or not you have ever seen that card before.

A. Yes, sir, this is the card which Investigator Burrow brought to me at that time.

Mr. MACKENZIE. Your Honor, at this time I would like to offer Government's Exhibit 1, for identification, being 26 an alien registration receipt card, Registration No. A14 713 099, containing a picture of the defendant Dimas Campos-Serrano, and bearing the name Vargas-Garcia, Dimas; and indicating the sex as being male, in evidence as Government's Exhibit 1.

Mr. CLEARY. At this time, your Honor, to save the Court's time and consideration, I would incorporate all previously made motions and objections.

The COURT. They may be so incorporated, but Government's Exhibit 1 will be received into evidence.

Mr. MACKENZIE. Would you strike the identification mark, please?

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 1.)

By Mr. MACKENZIE:

Q. Investigator White, what if anything did you do then?

A. I examined the card with my flashlight and saw that it contained a picture of the defendant. I observed that it appeared to have been altered in that the picture appeared 27 to have been changed, and Mr. Darrow called my attention then to the reverse, where the name had been erased and typed over, and also the son.

Q. Investigator White, would you examine this Government's Exhibit 1 and again indicate to the Court wherein the alterations you noticed occurred?

A. Yes, sir. When light is placed on the rear of the card it appears that the picture has been changed in that it doesn't appear to fit in the card as it should.

Also, the perforations which our service places in the card, the I and N S, which are stamped through the card and the picture, do not line up. Some of the perforations are through the card but do not go through the picture.

Also on the reverse the name appears to have been erased and typed over, and the sex erased and changed.

Q. What if anything happened next, Inspector White?

A. We took the subject, the defendant, into custody, and he was alleged to gather his person belonging, and as he 28 left the apartment Investigator Burrow warned him of his rights.

Mr. MACKENZIE. The Government has no further questions, your Honor.

The COURT. Mr. Cleary.

CROSS EXAMINATION

By Mr. CLEARY:

Q. Investigator White, had you testified before a federal grand jury in this matter?

A. No, sir.

Q. Have you made any written statements or memorandum of the investigation, or matters relating to your testimony in this particular case?

A. I have filled out a Form 213 in this case relating to the subject.

Mr. CLEARY. Since I am unfamiliar with the Form 213—

Mr. MACKENZIE. Your Honor, that was one of the documents that was suppressed in the Government's Group Exhibit 5.

The COURT. Do you want to talk about it, Mr. Cleary?

Mr. CLEARY. No, sir, not at all.

By Mr. CLEARY:

Q. Investigator White, have you talked to any of 29 the other Immigration agents in this case since 6 February 1969, the date of the last hearing in this matter?

A. Yes, sir.

Q. To whom have you spoken about this matter?

A. Well, it has been discussed with a number of people—I don't know exactly.

Q. Did you discuss it with Agent Burrow, for example?

A. Yes, with Agent Burrow and—or Investigator Burrow and Investigator Jacobs.

Q. How many discussions would you say you've had about this case?

A. We discussed it several times. I don't know exactly how many times.

Q. More than five or less than five?

A. Well, I would say less than five.

Q. Have you discussed the fact that you will be testifying this morning in this matter—

A. Yes, sir.

Q. Or sometime?

Did you discuss with them as to the probable testimony you would give in this matter?

A. Yes, sir, we discussed the facts, the things that 30 occurred that morning.

Q. Do you remember what time you arrived at the 2200 block on South California on the morning of 19 November 1968?

A. Not exactly, sir.

Q. Could you approximate, sir?

A. It would be between 8:30 and 9:00 o'clock.

Q. And how long were you there, sir, before you observed Agent Burrow encounter this third party, Mr. Ortiz?

A. About ten or fifteen minutes.

Q. How long after that encounter would you say the arrest of the defendant took place?

A. Oh, less than ten minutes, probably. About ten minutes.

Q. Did you have reason, concerning this particular matter, to call the headquarters or any other Immigration and Naturalization Service supervisor or district director about this matter?

A. Yes, I did.

Q. At what time did you place that call, sir?

A. I do not recall, sir. It would have been after 9:00 o'clock.

Q. To whom did you speak, if you now know or 31 could have recognized the voice?

A. I spoke to one of our secretaries who normally answers the radio.

Q. Do you know what her name is, sir?

A. Lorraine Machtemes. I believe it is M-a-c-h-t-e-m-e-s.

Mr. MACKENZIE. Your Honor, I fail to see—
The COURT. Yes, objection sustained.

By Mr. CLEARY:

Q. The observations you previously related in your testimony, were they all discovered concerning the alteration of the card at the time you examined the alien registration receipt card in the apartment of the defendant?

A. Yes, sir.

Q. You noticed the picture off on the alignment on the perforations on the holes?

A. Yes, sir.

Q. This card was handed to you by Agent Burrow?

A. Yes, sir.

Q. Were you able to overhear the conversation between Agent Burrow and the defendant prior to the receipt of the card by Agent Burrow?

A. No, sir.

32 Mr. CLEARY. I have no further questions of this witness, your Honor.

The COURT. Any redirect? If not, you may step down, Investigator White.

(Witness excused.)

The COURT. Anything further, Mr. District Attorney?

Mr. MACKENZIE. Yes, sir, your Honor.

If the Court please, at this time I would offer into evidence Government's Group Exhibit 2, for identification, this being the Immigration file of Diana Gloria Vargas, V-a-r-g-a-s, -Garcia, her registration number being A14 713 099, indicating to the Court that among the documents included therein is an application for a new alien registration receipt card.

The COURT. Certified to?

Mr. MACKENZIE. Yes, it is, your Honor.

Mr. CLEARY. I would have certain comments to make about the introduction of this document, if the Court will permit.

I acknowledge that I have had an opportunity to re-
33 view the matters contained in Government in Group Exhibit 2, for identification, and would offer these following objections:

There is no requisite foundation laid for the introduction of this type of evidence;

Two, that this is gross hearsay. There is no legitimate exception that would allow this type of evidence in;

Three, it is a denial of the defendant's constitutional right to confrontation of the witnesses against him in a criminal proceeding, protected by the Sixth Amendment, I believe, and the laws of this country.

Specifically I would like to outline the procedural inadequacy of the introduction of this exhibit at this time. The only justification for allowing this particular document into a criminal trial is pursuant to Rule 27 of the Federal Rules of Criminal Procedure, which by implication and reference incorporates Federal Rule 44 of the Federal Rules of Civil Procedures and these, of course, by implied reference refer to 28 U.S. Code Sections 1732 and 1733. That would be the normal chain in a criminal case as outlined by the Court of Appeals in *United States v. Holmes*, 387 F. 2d 781, Seventh Circuit, 1967.

34 The Government now tenders to this Court for consideration in a criminal prosecution—I cannot emphasize that enough—a criminal prosecution—documents which may be, far as I am concerned, in a deportation proceeding or in a civil case reviewing a deportation proceeding, admissible, but that in this particular transaction we cannot use authority under Title 8, which authorizes the Attorney General to prescribe rules for introduction of documents to override the existing procedures outlined for the introduction of evidence in a criminal case.

To get to the meat of this matter, I think that this person owning the true card—allegedly, according to this Government's Group Exhibit—Diana Gloria Vargar-Garcia—would be a necessary material, essential witness to the Government's case. I realize the relevance of the documents; however, the point is that there has been absolutely no showing of any form of unavailability by the Government to insure this man's right to confrontation of the witnesses against him, that they could not put that particular witness on the stand to testify as

35 to whatever might have been relevant concerning a card that she may or may not have owned, and to do it through this—what I consider totally inadequate—we haven't even heard from a custodian on these records—it would shock me that this evidence would be admitted in a criminal trial.

The COURT. What do you have to say?

Mr. MACKENZIE. Your Honor, may I comment, please?

Title 8 of the U.S. Code, Section 1103, is the powers and duties of the attorney general. Contained in that section is the power to delegate authority.

Pursuant to Title 8 of the Code of Federal Regulation 103.7 the district director of the Immigration Service may certify any record as a true copy.

What, in fact, is contained herein are the original records of the file of Diana Gloria Vargas-Garcia.

Title 28, U.S. Code, Section 1733, provides Government's records and papers—books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

Rule 27 of the Federal Rules of Criminal Procedure provides that an official record of an entry therein, or the lack of such a record or entry, may be proved in the same manner as in civil actions. This rule incorporates by reference Rule 44(a) of the Federal Rules of Criminal Procedure, which establishes a simple and uniform method for proving public records. It provides in part—

The COURT. The exhibit will be received into evidence.

Mr. MACKENZIE. Thank you, your Honor.

(Said exhibit, so offered and received in evidence, was marked Government's Group Exhibit 2.)

The COURT. Do you have anything further?

Mr. MACKENZIE. No, your Honor, I do not. The Government rests its case.

The COURT. Mr. Cleary.

Mr. CLEARY. Yes, sir, I would stipulate for the Government that the transactions taken place in this case all occurred in the Northern District of Illinois.

The COURT. Very well.

37 Mr. CLEARY. At this time I would move for judgment of acquittal.

The COURT. Overruled.

Mr. CLEARY. At this time the defense would rest, and I would again move for judgment of acquittal and ask that argument be permitted.

The COURT. You have educated me sufficiently in this case, Mr. Cleary. I shall give you five minutes.

Mr. CLEARY. I appreciate the generosity of the court, sir.

We have in this transaction—again, I won't repeat to the Court, but I incorporate all at this time, my motion to dismiss, my motion to suppress the card.

The motion to dismiss—the principal allegation which I would just like to emphasize a little more, was that this was not the type of document protected by 18 U.S.C. 1546.

More specifically, as we read the words of the indictment, it says that he knowingly and intentionally possessed—and that it further went on and said that the said alien—that the defendant then knew that the said alien registration receipt card was falsely made.

38 We have secured the card from the defendant by the Government's evidence, which has now been admitted to the Court. We have the card, but where does the evidence show beyond a reasonable doubt—and that is the amount necessary to sustain a criminal conviction—that he know that the matter was falsely made.

There is no evidence to indicate to this Court that he did not use that name or some other name, and what the Court would have to rely upon then is some type of inference upon inference as to the guilt of the defendant on these critical aspects which were, I think, properly inserted into the indictment—the knowing and intentional possession.

The man could have handed over someone else's card, the transaction as to—another factor that is involved in this case that I think, casts grave doubt as to the idea of this question that he knew that the card was falsely made.

Also, the statements of the agents, which of course again I objected to as to the circumstances surrounding the transfer of the card before the Court has consideration.

39 I would like to point out further that the need for a person to have this card, even though the statute says any person, has not been established. I mean, this could have been a U.S. citizen or otherwise, and we have no inference arising out of the fact that he is in fact an alien, and the Court cannot consider that he is an alien for the matter—it is just a question arising concerning the card.

The last thing that I would like to point out is that there has been no showing evidentiary-wise, and I think it is important because there was some ambiguity in the arguments of counsel for the Government and counsel for the defense, that this was a document required for entry.

Based upon that and all the previous motions I made in this case, I respectfully submit that the Court should return a finding of not guilty.

Mr. MACKENZIE. Your Honor, the Government will rely on the answers made to the various motions to suppress confessions and statements and evidence and to dismiss the indictment—the testimony of the agents here, we believe, beyond reasonable doubt we've proved that the individual 40 knowingly and willfully possessed this card, presented it.

The testimony indicates from the stand that he was an alien. He stated his citizenship was Mexico. I don't believe that there is any question left that the individual did in fact commit the offense charged in the indictment.

Thank you, your Honor.

The COURT. Let me see Government's Exhibit 1. I have never actually seen it.

Mr. MACKENZIE. Excuse me, your Honor.

The COURT. Thank you.

Mr. MACKENZIE. Pardon me.

The COURT. There will be a finding of guilty, Judgment will be entered upon that verdict of the Court.

Mr. Cleary, I am prepared to pass sentence. I don't believe there is any requirement for any presentence investigation here.

Mr. CLEARY. No, sir.

I would ask that the Government would disclose what was the disposition of the case involving Mr. Jose Rodriguez Ortiz, charged with a similar offense, merely for information of defense counsel and for the Court.

41 The COURT. You mean for mitigation?

Mr. CLEARY. Yes, sir.

The COURT. To me.

Mr. MACKENZIE. Your Honor—

The COURT. You are required to do that as an officer of this court.

Mr. MACKENZIE. Mr. Ortiz pled guilty. I'm not certain of the date right now. It was in the early part of December—I believe around the 16th or 12th of December—and he was

placed on five years' probation, a condition of the probation being that he not reenter the United States illegally during that period or he would be sentenced—I'm not sure whether it was two years—

The COURT. Now, you have answered that question.

What do you have to say in this case?

Mr. CLEARY. At this time I would like to point out to your Honor that this defendant has absolutely no criminal record whatsoever, that he merely manifested a desire to obtain work in this country, that he came up to this country and was living here, supporting his family back in Mexico.

The family back in Mexico consists of—I believe he has seven brothers and sisters. I am not exactly sure on 42 the exact amount, but he was sending money home, and that in this particular case there was evidenced merely a desire to come to a better country, and I think sometimes in this particular situation we have to consider what the defendant's background was.

The COURT. You mean a better country economically, not a better country. I don't think he would agree to the fact that this was a better country than Mexico.

Mr. CLEARY. Well, I think he would, your Honor.

The COURT. I doubt it.

Mr. CLEARY. In any event, I think that the question is that these are continually these types of cases. I personally felt, and I exhibited to the Court, that this was a matter for straight deportation, which would have been the normal situation, and only upon reentry would a man be subject to—

The COURT. This is a felony.

Mr. CLEARY. Criminal prosecution.

However, the felony arises out of the fact of this falsely made certificate, and I think that there are many here that 43 are under different devices. I think the purpose of the statute was directed more towards those who would submit false documents, birth certificates and other documents to gain entry into this country.

The COURT. It is in the statute—it is that the indictment says.

Mr. CLEARY. Well, I know, the government and I have differences as to the indictment.

The COURT. I assume you would have, but that is what the indictment charges and the Code provides that it is a felony.—

Mr. CLEARY. Well, your Honor, I can only—

The COURT. — punishable by five years in the penitentiary or a \$2,000 fine or both.

Mr. CLEARY. I can only draw upon and ask for the discretion and generosity of the Court, because I think that although this man has gone through trial—

The COURT. He is entitled to a trial.

Mr. CLEARY. Yes, sir.

The COURT. There is no question about that, and he won't be penalized by the fact that he asked for a trial.

What do you have to say, Mr. District Attorney?

44 Mr. MACKENZIE. Your Honor, the Government has no evidence to indicate that the defendant has any prior criminal record or any prior violation of the Immigration laws.

The Government would point out to your Honor the recurring problem to this country of aliens entering illegally, that this problem is of course compounded gravely by the use of fraudulent documents which are purchased or procured down in Mexico and are used to obtain entry into the United States illegally, as in the case of the defendant herein.

That is all, your Honor.

The COURT. Very well, I will recess the court for five minutes.
(A short recess was taken.)

The COURT. Let the record reflect that the defendant has been, through the interpreter, permitted to speak to this Court and he has related to the Court that he asks permission to go back to Mexico.

He knows that this is a felony, that I can send him to the penitentiary for five years and fine him \$2,000—does he know that?

45 The DEFENDANT. (Through Interpreter) No, I didn't know that.

The COURT. You are now advised by me that that is true, and also by your counsel.

Mr. CLEARY. We have discussed the penalty before, your Honor.

The COURT. Yes.

Mr. CLEARY. He might not have known it at the time of the offense.

The COURT. All right.

Well, I will herewith remand him to the custody of the Attorney General for a period of three years, and I shall suspend

that sentence, placing him on probation for that time.

Now, you tell him that.

The DEFENDANT. (Through Interpreter) Yes.

The COURT. And if you reenter the United States I can impose the sentence. Tell him that.

The DEFENDANT. (Through Interpreter) Yes, I will never be back.

The COURT. The condition of that probation is that he better not return to the United States illegally.

The DEFENDANT. (Through Interpreter) Yes.

46 The COURT. And he will pay his own way back to Mexico, Mr. Ferris.

Mr. District Attorney.

Mr. MACKENZIE. Your Honor, I would request at this time that the United States Marshal be directed to remand the defendant to the custody of the Immigration Service for deportation, pursuant to the deportation entered on November 22.

The COURT. It is so ordered.

Mr. CLEARY. Your Honor, at this time in this proceeding what I would like to do is file together and collectively a renewed motion for judgment of acquittal, motion for new trial and motion for arrest of judgment.

The COURT. Overruled.

Mr. CLEARY. At this time I would file with the Court a notice of appeal and a motion for leave to proceed in forma pauperis.

The COURT. Motion to appeal is denied as being frivolous.

Motion to proceed in forma pauperis is denied. He is going back to Mexico.

Mr. CLEARY. Can I file the document with the Court, sir?

47 The COURT. You may file the document, but it is denied. You can file it.

Anything further, Mr. Cleary?

You can file whatever documents you want:

Mr. CLEARY. No, sir, that takes care—

The COURT. But they are denied. He is fortunate in having you make the plea that you did make for him, and tell him I said so.

Mr. CLEARY. Thank you very much, your Honor.

One point though, your Honor. You made an aside to the reference that the defendant was to pay his own way back to Mexico.

The COURT. He said that to the interpreter.

Mr. CLEARY. But I don't think he has the money.

The COURT. He told the interpreter that, didn't he, sir—
Mr. Wimer?

Mr. WIMER. Yes, sir, and he will repeat it again just now—

Mr. CLEARY. Did you ask him how much money? If he had, I didn't know, so there's no misunderstanding.

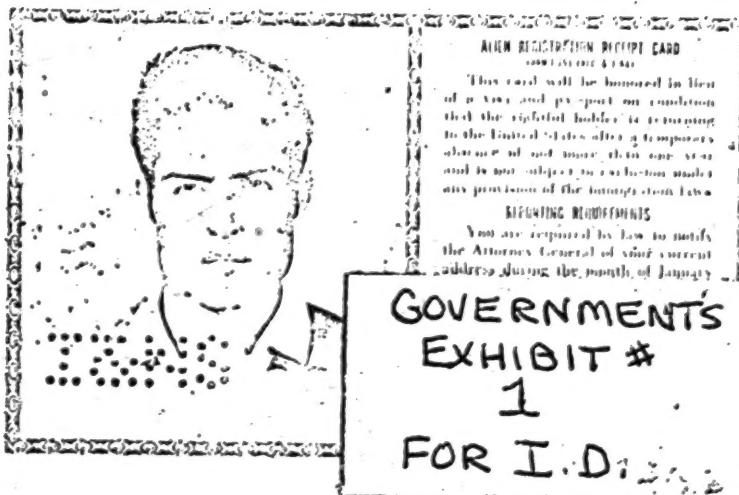
Mr. WIMER. I didn't ask him that, because your Honor—

The COURT. You just forgot to get your fee.

This court stands in recess until 2:00 o'clock.

48 Mr. CLEARY. Thank you, your Honor.

(Which were all of the proceedings had at the trial of the within cause on the day and date herein.)



This is to certify that					
VARGAS-GARCIA, DIMAS					
A14 713 099			(REGISTRATION NUMBER)		
has been duly registered according to law and was admitted to the United States as an immigrant at					
PORT	MO.-DAY-YR. OF ENTRY	CLASS	MO.-DAY-YR. OF BIRTH	SEX	
LAR	03-17-65	0-1	08-17-49	M	
82	Commissioner of Immigration and Naturalization UNITED STATES DEPARTMENT OF JUSTICE				
IF 18 YEARS OF AGE OR OLDER, YOU ARE REQUIRED BY LAW TO HAVE THIS CARD WITH YOU AT ALL TIMES.					

Form approved
Budget Bureau No. 43-2607

TCB

APPLICATION BY LEGAL PERMANENT RESIDENT ALIEN
FOR ALIEN REGISTRATION RECEIPT CARD, FORM I-151

(Please read instructions on the reverse)

Applicant Do Not Fill in This Block	
FILE NO. <u>1444713 099</u>	
<input type="checkbox"/> Fee Required	<input type="checkbox"/> Fee Not Required
<u>3-568</u>	<u>EX-151</u> <u>Nov 15 1968</u>
Immigration and Naturalization Service Laredo, Texas Date <u>11/15/68</u> Verified by <u>TSB</u>	

1. Apply for an Alien Registration Receipt Card (Form I-151), and attach any previously issued Form I-151 or other evidence of registration now in my possession. My Alien Registration Number is _____.

1. Reason for Application (Please check appropriate blocks.)

(a) My alien registration receipt document was lost destroyed on or about Jan 12, 1968 under the following circumstances: In Nuevo Laredo, Tamps Mex.
I had my card in a small purse, in an overcoat and it, the purse, was stolen from my overcoat pocket.
(If my document is recovered, I will surrender it to the Immigration and Naturalization Service.)

(b) My name has been changed. (c) My present Form I-151 is nullified.

(d) If you checked "(a)", "(b)", or "(c)" above, see instruction Number 6 concerning fee required.

(e) My evidence of alien registration is on a form other than Form I-151.

(f) I never received Form I-151.

(g) My present Form I-151 is in poor condition because of improperlamination.

(h) I am required by Section 262(b) of the Immigration and Nationality Act to be registered and fingerprinted after my 14th birthday.

1. Name <u>GARCIA</u>	(Last) <u>Diana Gloria</u>	(First) <u></u>	(Middle) <u></u>	2. Nationality <u>Mexico</u>
3. Admitted to U.S. at <u>Laredo, Texas</u>	(City) <u></u>	(State) <u></u>	4. Date of Admission (Month/Year) <u>Mar 17, 1964</u>	5. Date of Birth (Month/Year) <u>Aug 17, 1949</u>
7. Means of Arrival (Name of Vessel, or Airline and Flight No., etc.) <u>Toll bridge.</u>	8. Destination in U.S. or Term of Admission <u>Laredo, Texas.</u>	9. Place of Birth (City) (Province or State) <u>(Country) Laredo, Tamps Mex.</u>		
10. Name Used When Registered as an Alien (If same as present, write "Same") <u>Same.</u>	11. Name Used When Lawfully Admitted for Permanent Residence (If same as present, write "Same") <u>SAME.</u>			
12. Present Address (Street, City and State, Country, ZIP Code, If in U.S.) <u>208 North Hertiola, Laredo, Texas 78040</u>	13. Address in the U.S. (If same as present address, write "Same") <u>Same.</u>	14. Date of Last Departure from U.S. <u>11/15/68</u>		
15. (If you intend to use Form I-151 as a document for travel within the next six weeks, give the date of your intended departure, list each country to be visited, and be sure to read instruction 7 in regard to the limitations on use of Form I-151 for travel in or through certain countries.)				
16. Date of Proposed Departure <u>11/15/68</u>	17. Countries to be Visited <u>11/15/68 - 1-15-69</u>			
18. Signature of Person Preparing the Card or Other Than Applicant I DECLARE that this application was prepared by <u>me</u> and the request of the applicant and is based on all information of which I have any knowledge. <u>Diana Gloria</u>				
19. Signature of Applicant I CERTIFY that the information above is true and correct to the best of my knowledge and belief. <u>Diana Gloria</u>				

Form I-151
(Rev. 3-1-67)UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

APPLICANT: DO NOT WRITE BELOW THIS LINE
(For use in searching Records of Arrival)

RECORDS EXAMINED		RECORDS FOUND	
Card Index		Port of Entry	
Index Books		Name at Time of Entry	
Manifests			
Signature of Searcher		Date of Admission	
		Marital Status	
		Means of Arrival (Vessel, Airline, etc.)	

(For use by Immigration or Consular Office)

Jan 15, 1968

Laredo, Texas.

The applicant was interviewed by me under oath on _____ (date) _____ (city)
Remarks: Calms this is the only 1-151 she has lost. Enrolled in Christen Jr. Hi. Laredo.
Appears eligible in all respects to receive new 1-151.
Both parents live in Laredo, Texas.

L. D. Pen *ACCE*
(Signature) (Title)

I recommend that the application be <input checked="" type="checkbox"/> Granted <input type="checkbox"/> Denied	APPROVED <input checked="" type="checkbox"/> DISAPPROVED <input type="checkbox"/>
<i>K. W. Pen</i> <i>1-151</i> Immigration Officer	<i>J. W. Bellard</i> <i>1-151</i> District Director
Date:	Date: 1-2-68

INSTRUCTIONS

- PURPOSE** — To apply for an Alien Registration Receipt Card (Form I-151) for any of the reasons listed in Item 1 on the face of this form. This application may be used only by an alien who is a lawful permanent resident of the United States.
- HOW TO PREPARE** — Fill in, in single copy only, by typewriter, or print in black letters, in ink.
- DOCUMENTARY EVIDENCE** — You are required to submit with this application any Alien Registration Receipt Card (Form I-151) or other evidence of alien registration now in your possession. An application for a new Alien Registration Receipt Card in a name other than the name which appears on the card previously issued to you must be accompanied by a certificate of your name. If your name has been changed by order of any court of competent jurisdiction, or by marriage, if you are applying for the issuance of a card in a changed name, you must attach to this application a certified copy of the decree of your marriage or of the decree of the court changing your name. If you live in a state where, under the laws of the court changing your name, certain acts were required of you before the decree became final, you must also attach a certificate from the court that you have complied with the conditions of the decree changing your name.
- PHOTOGRAPHS** — You are required to send with this application 2 identical photographs of yourself taken within 30 days of the date of this application. These photographs must be 1 1/4 inches in size, and the distance from top of head to point of chin should be approximately 1 1/2 inches. They must NOT be posted on the card or mounted in any other way. They must be on white paper, have a light background, and clearly show a front view of the face without hat. Snapshots, group pictures, full-length portraits, magazine photographs will not be accepted. DO NOT sign your PHOTOGRAPHS. Using crayon or soft pencil to avoid possible mutilation of the photographs, write your alien registration number lightly on the reverse of the photographs. Consideration will be given to waiver of photographs for applicants who are confined due to age or physical infirmity.
- DATE OF YOUR ARRIVAL** — If you do not know the exact date of your arrival in the United States, or the name of the vessel or port, and you cannot obtain this information by consulting your family or friends who came over with you, give the facts of your arrival as you remember them, if you have them, may help you to answer these questions.
- FEES** — If you checked "(a)", "(b)", or "(c)" of item 1, a fee of \$2.00 must accompany this application. Otherwise, no fee is required. Remittances should be made payable to the "Immigration and Naturalization Service, Department of Justice." If residing in the Virgin Islands, remittance should be drawn in favor of the "Treasury, Guam." If you mail this application, attach money order or check. DO NOT SEND CASH. The fee is required for filing the application and is not returnable regardless of action taken thereon.
- USE OF FORM I-151 AS TRAVEL DOCUMENT** — The rightful holder of Form I-151 may present that document at a United States port of entry, in or to a state, when returning to the United States after a temporary absence not exceeding one year, except when restrictions on travel to, in or through Albania, Cuba, Outer Mongolia, Communist portions of China, Korea and Viet-Nam, Bulgaria, Czechoslovakia, Poland, Hungary, Latvia, Lithuania, Poland, Romania, the Soviet Zone of Germany ("German Democratic Republic"), the Union of Soviet Socialist Republics, or Yugoslavia are applicable. Information concerning exemption from such restrictions may be obtained at any Immigration and Naturalization Service office.
- WHERE TO SUBMIT THIS APPLICATION** — If you are in the United States, submit the application to the Immigration office having jurisdiction over the place where you are residing. If you are outside the United States, submit it (either in person or through a United States consular officer) to the United States Immigration office outside the United States having jurisdiction over the place where you are temporarily residing. If you check Item 8(g) you must present the application in person at the Immigration office where you will be fingerprinted and registered.

DOCKETED ~~SEARCHED~~ ~~INDEXED~~ ~~FILED~~
 United States Court of Appeals

For the Seventh Circuit
 Chicago, Illinois 60604

April 7, 1969

FILED
 MAY 1, 1969

Before

Hon. _____

Hon. _____

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Misc.
 No 698

DIMAS CAMPOS-SERRANO,
 Petitioner,
 vs.
 UNITED STATES OF AMERICA.
 Respondent.

} Appeal from the United
 States District Court
 for the Northern
 District of Illinois,
 Eastern Division.

68-CR-732

ORDER

Dimas Campos-Serrano was a defendant in a criminal case in the district court, northern district of Illinois. He was "permitted to proceed there as one who is financially unable to obtain adequate defense". After conviction on March 4, 1969 he filed a notice of appeal. The presiding judge entered an order denying leave to appeal in forma pauperis as frivolous.

Defendant has proceeded as if this order were a certification that the appeal is not taken in good faith, under Rule 24(a) F.R.A.P. His appointed counsel filed a timely motion in this court for leave to proceed in forma pauperis. The motion, as required by the rule, was accompanied by a copy of defendant's affidavit of financial status, filed in district court, and a copy of the court's draft order, apparently being the only statement of the reasons for the

Misc. 698 -

CORRECTED

4/7/69

-2-

Certified CJP

court's certification. There is also a statement of reasons for allowing the appeal, verified by appointed counsel. The only deficiency under the rule is that defendant did not subscribe and swear to this statement, but we do not consider this a serious defect.

The statement does make claims of error which can not be readily dismissed as meritless, and the government has committed response to these claims.

IT IS ORDERED that leave to proceed on appeal in forma pauperis is granted.

IT IS FURTHER ORDERED that the official court reporter for the above-entitled case in the United States District Court for the Northern District of Illinois Eastern Division be directed to transcribe all pretrial, trial and post-trial proceedings conducted in this case, and that the charge for these proceedings be at no expense to defendant-appellant but at the expense of the Administrative Office of the United States Courts.

IT IS FURTHER ORDERED that said record be certified by the Clerk of the United States District Court and transmitted to the Clerk of this Court.

IT IS FURTHER ORDERED that Mr. John J. Cleary, Attorney at Law, 1155 E. 60th Street, Chicago, Illinois, be, and he is hereby appointed to represent the petitioner-appellant in this matter.

IT IS FURTHER ORDERED that the printing of the appendix in this matter be waived and leave is hereby granted to file twelve (12) typewritten copies of the brief for petitioner-appellant, with the provision that at least one copy thereof be served upon counsel for respondent-appellee and proof of such service be filed at the time petitioner-appellant's brief is filed.

A True Copy
John J. Cleary

Thomas F. Sturke, Chief Deputy
Clerk of the United States Court of
Appeals for the Seventh Circuit

In the United States Court of Appeals for the
Seventh Circuit

No. 17645

September Term, 1969—April Session, 1970

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DIMAS CAMPOS-SERRANO, DEFENDANT-APPELLANT
Appeal from the United States District Court for the Northern
District of Illinois, Eastern Division

June 25, 1970

Before HASTINGS, Senior Circuit Judge, and KILEY and
KERNER, Circuit Judges

KERNER, *Circuit Judge*. Defendant Dimas Campos-Serrano was indicted for violation of 18 U.S.C. § 1546, knowing possession of a forged alien registration receipt card. He was tried without a jury and was found guilty. From this verdict, he appeals.

On November 19, 1968, agents of the Immigration and Naturalization Service (INS) conducted an investigation of an area in the City of Chicago where it was suspected that aliens who were improperly in the country were working. Agents Jacobs and Burrow having arrested Manuel Rico, accompanied him to his apartment in order that he could obtain his personal belongings. When they arrived at the apartment, the permits were to be surrendered upon return. Section 22 of the 1924 Immigration Act provided penalties for forging immigration visas and permits. *Id.* § 22, 43 Stat. 165. The reentry permits were included in the definition of permit by statute. *Id.* § 28(k), 43 Stat. 169.

Alien registration receipt cards were first issued under the Immigration Act of June 28, 1940. Act of June 28, 1940, ch. 439, § 31, 54 Stat. 673-74. Further, the same statute authorized the use of border crossing identification cards as entry documents. *Id.* § 30, 54 Stat. 673. In 1946, the alien registration receipt card was changed by regulation to include the same information as was contained in a Resident Alien's Border

Crossing Identification Card and either was accepted upon entry into the county. 17 Fed. Reg. 4921 (May 30, 1952).

In 1948, Section 22 was repealed but was reenacted in modified form as 18 U.S.C. § 1546, which provided in part: "Whoever knowingly forges, counterfeits, alters or falsely makes any immigration visa or permit. * * *" The INS regulation stated:

(h) The term "permit to enter" means an immigration visa, a reentry permit, a passport visa, a transit certificate, a limited-entry certificate, a border crossing identification card, or a crew-list visa, issued by a permit-issuing authority.

8 CFR 175.41 subpara. (h) (1952).

An alien registration receipt card is included in this definition since it could be used as a reentry permit. In 1952, 18 U.S.C. § 1546 was modified such that "immigrant or non-immigrant visa, permit, or other document required for entry into the United States" was substituted for "immigration visa or permit." In so doing, Congress was expanding the definition of forged documents being used to enter the United States. Since alien registration receipt cards were being used for entry previously, we think it was Congress' intention that they be included in § 1546. We do not think it was necessary for the statute to include "reentry" as well as entry permits. Section 22 of the Act of 1924 included reentry permits within the definition of "permit" and we find no clear intention on the part of Congress to diminish this definition. Rather, we find that Congress intended to expand the scope of documents being covered in 18 U.S.C. § 1546.

We do not accept the argument of the defendant that Congress sought to cover possession of forged alien registration receipt cards in 8 U.S.C. § 1306(d). Section 1306(d) covers the act of counterfeiting and forging the cards while § 1546 is directed to their use for the purpose of entering the United States illegally. Further we find no support for the defendant in *Lau Ow Bew v. United States*, 144 U.S. 47 (1892), where the Supreme Court was specifically concerned with the Chinese Exclusion Act of 1882. To the extent that *McFarland v. United States*, 19 F. 2d 807 (6th Cir. 1927), implies a different result, we disagree. See *United States v. Mouyas*, 42 F. 2d 743, 744 (S.D.N.Y. 1930).

We conclude that indictment under 18 U.S.C. § 1546 for possession of a forged alien registration receipt card was proper.

Defendant claims that the agents failed to give him *Miranda* warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966), before asking him to produce his alien registration card the second time. For *Miranda* to apply, the documents or papers must be protected by the fifth amendment. *United States v. Webb*, 398 F. 2d 553, 556 (4th Cir. 1968), and this is the initial inquiry we must make.

An alien 18 years and older is required to have in his possession "any certificate of alien registration or alien registration receipt card" at all times. 8 U.S.C. § 1304(e). In *Shapiro v. United States*, 335 U.S. 1 (1948), the Court concluded that the fifth amendment privilege does not apply to documents which are kept in the normal operation of the business and also required to be kept for examination under the Emergency Price Control Act. The Court in *Marchetti v. United States*, 390 U.S. 39 (1968), declined to reassess *Shapiro* but rather distinguished it on the basis that the three elements discussed in *Shapiro* were not satisfied: (1) "obliged to keep and preserve records 'of the same kind as he customarily kept;'" (2) "public aspects;" and (3) "'an essentially non-criminal and regulatory area of inquiry.'" *Marchetti*, *supra*, at 57. Alien registration receipt cards are not customarily kept. If the government did not require possession of the cards, aliens would not keep them in their normal course of affairs since they are not business records. Further, the cards do not come within the phrase "public aspects." The suggested meaning of "public aspects" is records which are usually known to the public in general rather than records which are essentially personal to the individual. *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 95, 201 (1968).

The compulsion that is constitutionally forbidden is a coercion which forces the individual to give open manifestation to thoughts or conduct that would not ordinarily be expressed in a concrete form available to a significant number of people. Thus, for purposes of defining the limits of the privilege against self-incrimination, the determining factor is whether the information sought is of such a nature that it would come into independent existence in the absence of government compulsion.

Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Col. L. Rev. 681, 694 (1965).

Cards which disclose whether an individual is an alien are private and the fact that public officials may require that they be kept does not make them public. *Marchetti v. United States*, *supra* at 57; *The Supreme Court, 1967 Term, supra*. As to the last element, alien registration receipt cards fall in the non-criminal regulatory area of inquiry. The purpose is essentially for the government to be aware of the number of aliens in the country and their status. Cf. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

Since the purpose of these cards is non-criminal, the fifth amendment privilege should not prevent production in the normal immigration inquiry situation. Cf. *United States v. Sullivan*, 274 U.S. 259 (1927). Here the initial inquiry to determine whether the defendant was properly in this country did not violate his fifth amendment privilege. However, when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged "cards" and the defendant's card had previously been examined, the privilege should apply. An individual should not be compelled to produce the crime itself. Otherwise, it would be the same as the agents compelling the individual to say: "I did it." Here, production of a forged card was sufficient without more to convict the defendant of possession of forged entry documents under 18 U.S.C. § 1546 and the defendant's fifth amendment protection should have been respected by the agents.

The government contends that the "card" is not testimonial evidence but physical evidence under *Schmerber v. California*, 384 U.S. 757 (1966), and *Gilbert v. California*, 388 U.S. 263 (1967). Physical evidence in those cases includes evidence which is used for the purpose of identification of a defendant. Since the two justifications for the fifth amendment privilege are "(1) preservation of official morality, and (2) preservation of individual privacy" * * * McKay, *Self-Incrimination and the New Privacy, The Supreme Court Review—1967*, at 193, 214, physical evidence is not protected. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that private papers subject to a subpoena were protected by the fifth amendment. Such papers might contain some sort of personal confession of a defendant and are different from handwriting exemplars which

may be used to identify a defendant but may not be admitted for their content. To force an individual to produce papers which are unknown to the public would violate his right of privacy. An alien registration receipt card is similar to the private papers in *Boyd*. As we said previously, the cards do not fall within the framework of "public aspects" as used by the Court in *Marchetti*. Here, introduction of the forged card which was in defendant's possession is *prima facie* evidence of violation of 18 U.S.C. § 1546 and the only effective evidence defendant could produce in rebuttal would be for him to testify. Thus, he is being forced to waive his fifth amendment privilege. See *The Supreme Court 1966 Term*, 81 Harv. L. Rev. 112, 116-17 (1967).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that an individual must be advised of his constitutional rights when the interrogation is custodial in nature. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Custodial interrogation may occur outside the surroundings of a police station as in *Orozco v. Texas*, 394 U.S. 324, 326-27 (1969), where the defendant was questioned by police officers in his bedroom at 4:30 in the morning. In *Dickerson v. United States*, 413 F. 2d 1111 (7th Cir. 1969), this court held that *Miranda* warnings must be given at the beginning of an Internal Revenue Service criminal investigation.

We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. * * * [I]t is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe.

413 F. 2d at 1114-16.

We think that the case before us falls in between the custodial interrogation in *Orozco* and the non-custodial interrogation in *Dickerson*. Here the defendant was asked to produce his card a second time by the same agent. At both times, the agents were accompanied by a roommate of the defendant who was in custody of the agents and who was told to gather up his belongings. We think that the circumstances created an overbearing atmosphere which was sufficient to satisfy the requisite degree of compulsion required by the fifth amendment. *Miranda v. Arizona, supra*.

For the foregoing reasons we think that the defendant should have been given *Miranda* warnings before he was asked to produce his alien registration receipt card a second time. Since the warnings were not given, the forged card should not have been admitted into evidence. Therefore, we reverse and remand this case to the district court for further proceedings consistent with this opinion.

We wish to thank Mr. John J. Cleary, as court-appointed counsel, who was assisted on the brief by Mr. John D. Shullenberger, for their excellent service to the court in behalf of the defendant-appellant.

REVERSED AND REMANDED.

United States Court of Appeals for the Seventh Circuit,
Chicago, Illinois 60604

No. 17645

Thursday, June 25, 1970

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DIMAS CAMPOS-SERRANO, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before Honorable JOHN S. HASTINGS, Senior Circuit Judge;
Honorable ROGER J. KILEY, Circuit Judge; Honorable
OTTO KERNER, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern

District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from, be, and the same is hereby, Reversed, and that this cause, be, and it is hereby Remanded to the said District Court for further proceedings consistent with the opinion of this Court filed this day.

United States Court of Appeals for the Seventh Circuit,
Chicago, Illinois 60604

No. 17645

Thursday, October 1, 1970

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DIMAS CAMPOS-SERRANO, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before Hon. LUTHER M. SWYGERT, Chief Judge,* Hon. JOHN S. HASTINGS, Senior Circuit Judge, Hon. ROGER J. KILEY, Circuit Judge,** Hon. THOMAS E. FAIRCHILD, Circuit Judge,* Hon. WALTER J. CUMMINGS, Circuit Judge,** Hon. OTTO KERNER, Circuit Judge,** Hon. WILBUR F. PELL, Jr., Circuit Judge *

As all members of the panel (Judges Hastings, Kiley and Kerner) voted to deny the petition for rehearing filed by the government in the above entitled matter, it is ordered that the said petition for rehearing be, and the same is hereby, denied.

On the government's suggestion for rehearing *en banc*, since a majority of the Judges in active service did not vote to grant a rehearing *en banc*, the suggestion is therefore Denied.

*Judges Swygert, Fairchild and Pell voted to grant the suggestion for hearing *en banc*.

**Judges Kiley, Cummings and Kerner voted to deny the suggestion for rehearing *en banc*.

Supreme Court of the United States

October Term, 1970

No. 1028

UNITED STATES, PETITIONER

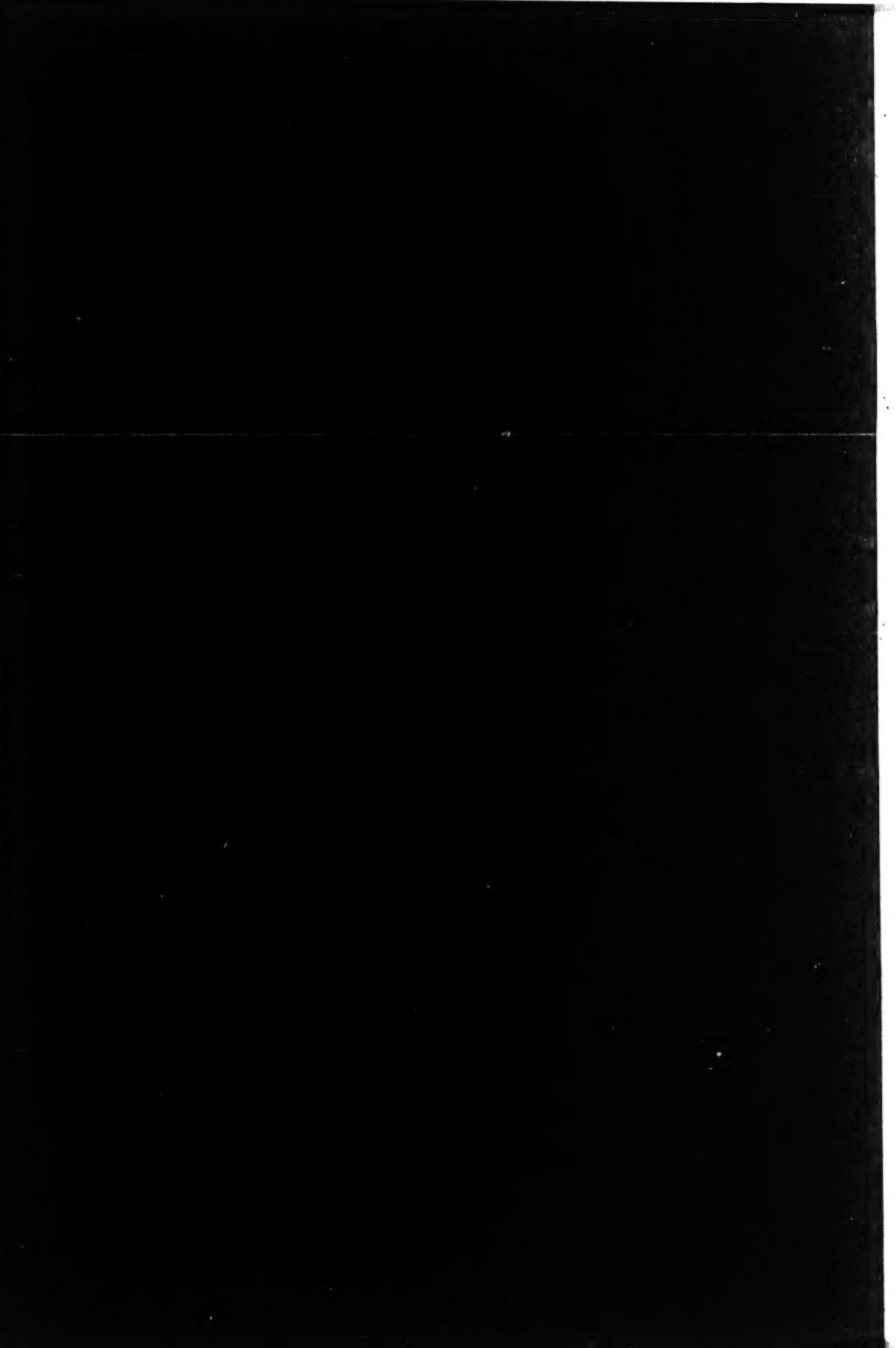
v.

DIMAS CAMPOS-SERRANO

Order Allowing Certiorari

Filed March 1, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the writ	6
Conclusion	13
Appendix A	15
Appendix B	24
Appendix C	25

CITATIONS

Cases:

<i>Albertson v. Subversive Activities Control Board</i> , 382 U.S. 70	10
<i>Boyd v. United States</i> , 116 U.S. 616	7
<i>Chavez-Martinez v. United States</i> , 407 F.2d 535, certiorari denied, 396 U.S. 558	9
<i>Davis v. United States</i> , 328 U.S. 582	10, 12
<i>Lowe v. United States</i> , 407 F.2d 1391	7, 9
<i>Marchetti v. United States</i> , 390 U.S. 39	10
<i>Mathis v. United States</i> , 391 U.S. 1	7
<i>Miranda v. Arizona</i> , 384 U.S. 436	2, 5, 6, 7, 8
<i>Orozco v. Texas</i> , 394 U.S. 324	7, 8
<i>Shapiro v. United States</i> , 335 U.S. 1	10, 12
<i>United States v. Dickerson</i> , 413 F.2d 1111	8, 9
<i>United States v. Hall</i> , 421 F.2d 540, certiorari denied, 397 U.S. 990	7
<i>Windsor v. United States</i> , 389 F.2d 530	7

(1)

Constitution, statutes and regulations:	Page
U.S. Constitution, Fifth Amendment	6, 7, 10, 12
Immigration and Nationality Act of 1952, Section 287(a)(1), 8 U.S.C. 1357(a)(1)	3
8 U.S.C. 1302	10
8 U.S.C. 1303	11
8 U.S.C. 1304(a)	10
8 U.S.C. 1304(d)	11
8 U.S.C. 1304(e)	10, 11
8 U.S.C. 1306	10
18 U.S.C. 1546	2
8 CFR 264.1	11
8 CFR 264.1(a)	10
8 CFR 264.1(b)	11
8 CFR 264.1(c)	11
8 CFR 264.1(d)	11
Miscellaneous:	
1969 Annual Report of the Attorney General, pp. 82-83	6
Note: <i>Extending Miranda to Administrative Investigations</i> , 56 Va. L. Rev. 690 (1970)	9

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DIMAS CAMPOS-SERRANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case reversing a conviction for knowing possession of a false alien registration card.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 15-23) is reported at 430 F. 2d 173.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 24) was entered on June 25, 1970. A petition for rehearing with a suggestion for rehearing

en banc was denied on October 1, 1970 (Appendix C, *infra*, p. 25). On October 16, 1970, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below unduly extended *Miranda v. Arizona*, 384 U.S. 436, by holding, on the facts of this case, that agents of the Immigration and Naturalization Service were required to give respondent warnings before asking him to produce his alien registration card.
2. Whether an alien registration card is a "required record" which an alien must produce upon request irrespective of whether he is "in custody."

STATEMENT

After a trial in the United States District Court for the Northern District of Illinois, at which respondent waived a jury, he was convicted of having knowingly possessed a forged alien registration receipt card, in violation of 18 U.S.C. 1546. He was sentenced to a prison term of three years, which was suspended, and placed on probation on condition that he return to Mexico and not reenter the United States illegally.¹ The court of appeals reversed on the ground that the forged card had been illegally obtained by the government and was thus inadmissible in evidence.

¹ Respondent was remanded to the custody of the Immigration and Naturalization Service pursuant to a prior order of deportation.

The pertinent facts, which are not in dispute, were developed at a pretrial hearing on respondent's motions to suppress the card and certain statements. In the early morning of November 19, 1968, a number of agents of the Immigration and Naturalization Service (INS) conducted an investigation in an area of Chicago where it was suspected that aliens unlawfully in the United States were working.² They arrested some fifteen or sixteen aliens, including one Manuel Rico, for being in the United States in violation of the immigration laws (I Tr. 5, 10-12, 51, 53).³ About 8:00 a.m., the arrestees were offered the opportunity to return to their residences to obtain personal belongings. Rico accepted and was driven to his home (I Tr. 15, 35, 38, 53-55, 59). INS investigators Jacobs and Burrow accompanied Rico to his apartment where they were admitted by respondent. Upon entering, Burrow immediately advised respondent that Rico was under arrest and was merely being allowed to obtain his belongings (I Tr. 16-17, 39, 41). Burrow accompanied Rico to his room. Jacobs, who remained in the living room with respondent, inquired as to respondent's citizenship and, when respondent replied he was Mexican, asked to see his visa. Respondent explained that he had left his visa in Mexico. He

² Under Section 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(1), immigration investigators are authorized without a warrant to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States".

³ "Tr." refers to the transcript of the pretrial suppression hearing and subsequent trial.

produced instead an alien registration receipt card and a Social Security card. Jacobs inspected the documents and showed them to Burrow. Finding nothing amiss, the agents returned the documents to respondent. They then departed with Rico (I Tr. 19-21, 24-26, 41).

When they returned to the car, a third investigator, White, advised Burrow that an individual approaching them looked suspicious. Burrow spoke to the individual, Jose Rodriguez-Ortiz, and inquired as to his citizenship. In response, he produced an alien registration receipt card which, upon examination, Burrow and White determined to have been altered. They then placed Rodriguez-Ortiz under arrest, and White and Burrow went with him to obtain his personal belongings, which were in the same apartment in which they had encountered respondent. Rodriguez-Ortiz opened the door with a key. Upon entering, the agents advised respondent that their purpose was to permit the new arrestee to gather his clothing (I. Tr. 28-31, 60-63, 65, 84-90, 97, 99). While they waited, Burrow requested respondent to produce his alien registration receipt card a second time. After examining it under brighter light than before, Burrow concluded that the card had been altered.⁴ Respondent was arrested, given *Miranda* warnings, and transported to the INS offices (I Tr. 67-75, 90-91).

⁴ It was later determined that the card had originally been issued to one Diana Gloria Vargas-Garcia, who had applied for a new card (III Tr. 31-36).

The trial judge declined to suppress the card,⁵ and subsequently found respondent guilty as charged. The court of appeals reversed, holding that the INS agents had violated respondent's privilege against self-incrimination in connection with their second, although not their first, request to examine his alien entry registration card. The court reasoned that the privilege should not prevent production in the normal immigration inquiry situation (as in the first request) since the cards serve the non-criminal purpose of enabling the government "to be aware of the number of aliens in the country and their status". But the court viewed the second request differently: "[W]hen the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged 'cards' and the defendant's card had been previously examined, the privilege should apply" (App. A, *infra*, p. 20). The court further concluded that respondent was "in custody" within the meaning of *Miranda v. Arizona*, 384 U.S. 436, when the agent asked to see his card the second time. Accordingly, the court held the second inspection improper because it was not preceded by *Miranda* warnings.

The government's petition for rehearing *en banc* was denied by a 3-3 vote of the active judges of the court of appeals (App. C, *infra*, p. 25).

⁵ The judge did suppress post-arrest statements by respondent on the ground that they were made during a period of unnecessary delay in bringing him before a committing magistrate (II Tr. 35-47).

REASONS FOR GRANTING THE WRIT

This case presents important issues in the application of the Fifth Amendment privilege against self-incrimination to immigration investigations and, more generally, to a broad variety of other kinds of investigation. The decision below creates serious uncertainty as to the manner in which immigration investigators can carry out their statutory responsibility to determine whether aliens, or persons believed to be aliens, are lawfully in the United States (see p. 3, n. 2, *supra*). This alien control problem is of considerable practical magnitude. In 1969, 358,579 aliens were admitted to the country for permanent residence, 441,082 resident aliens returned from visits abroad, 3.2 million alien crewmen were granted shore leave and 3.6 million other aliens visited here for temporary periods. 1969 Annual Report of the Attorney General at 82-83. And beyond the enforcement of the immigration laws, the case raises general questions as to the scope of the "required records" exception in the administration of the privilege, and the meaning of "custody" in the application of *Miranda v. Arizona*, 384 U.S. 436.

1. *Miranda* requires that an individual be advised of certain rights before there may be "questioning initiated by law enforcement officers after [he] has been taken into custody or otherwise deprived of his freedom of action in any significant way," 384 U.S. at 444. Warnings are not required before "inquiry of persons not under restraint" or "[g]eneral on-the-scene questioning * * * of citizens in the fact-finding process."

384 U.S. at 477. But formal arrest is not the only circumstance in which warnings must be given. *Mathis v. United States*, 391 U.S. 1; *Orozco v. Texas*, 394 U.S. 324. "Custodial interrogation" may also be said to occur where police presence creates "inherently compelling pressures" on the individual "to speak where he would not otherwise do so freely," 384 U.S. at 441, 467, which are the equivalent of those which exist in a custodial environment.⁶ The courts of appeals are divided as to whether the test of "custody" depends primarily on subjective factors, such as the suspect's actual feeling that he is not free to go, or objective circumstances which would lead a reasonable man to conclude he is significantly deprived of his freedom. The latter test, which we believe to be correct, has been adopted by the Second and the Ninth Circuits. *United States v. Hall*, 421 F. 2d 540 (C.A. 2), certiorari denied, 397 U.S. 990; *Lowe v. United States*, 407 F. 2d 1391 (C.A. 9). The Fifth Circuit has stressed the subjective purpose of the interrogating agent, see *Windsor v. United States*, 389 F. 2d 530 (C.A. 5), and the decision below appears to have placed critical emphasis on the subjective feelings of the respondent.

⁶ Although most cases, unlike this one, have dealt with actual questioning rather than a request to produce a document, we do not here take issue with the court of appeals' determination that the alien registration receipt card, if it is not subject to production on demand as a "required record," see, *infra*, pp. 10-13, is protected by the Fifth Amendment. See *Boyd v. United States*, 116 U.S. 616.

The court below relied in part on *Orozco, supra*, and in part on its earlier decision in *United States v. Dickerson*, 413 F. 2d 1111 (C.A. 7). That decision required that full *Miranda* warnings be given at the outset of any investigation by special agents of the Internal Revenue Service, despite the absence of any form of custody, because the taxpayer may be unaware of the criminal stakes and his right to refuse to cooperate. The court asserted that the present case (App. A, *infra*, pp. 22-23).

* * * falls in between the custodial interrogation in *Orozco* and the non-custodial interrogation in *Dickerson*. Here the defendant was asked to produce his card a second time by the same agent. At both times, the agents were accompanied by a roommate of the defendant who was in custody of the agents and who was told to gather up his belongings. We think that the circumstances created an overbearing atmosphere which was sufficient to satisfy the requisite degree of compulsion required by the fifth amendment. *Miranda v. Arizona, supra*.

The cause of any "overbearing atmosphere" which may be said to have existed here is not any action by the INS agents but rather respondent's subjective fears that his false card would be discovered. Unlike the situation in *Orozco*,⁷ the requests to respondent for his card occurred during normal hours. The fact that his roommates were under arrest both times the officers requested his identification indicated to re-

⁷ In that case, the accused was interrogated regarding a homicide in his bedroom at 4:00 a.m. by four police officers, one of whom testified that "petitioher was under arrest and not free to leave." 394 U.S. at 327.

spondent that the officers might question whether he too was lawfully in the country. The officers did nothing else on either occasion which would, for a reasonable man, create a coercive atmosphere. The only possible difference between the two requests is that the second one may have indicated that the officers were more suspicious of respondent than they were at first. But knowledge that an officer is suspicious, regardless of the degree, is not, by itself, so inherently coercive as to constitute the equivalent of custody. If it were, routine law enforcement activity, such as requesting individuals suspected of driving a stolen car to produce their drivers' licenses and questioning persons at the border as to the nature of the goods they are bringing into this country, could not take place without giving *Miranda* warnings. The courts have, however, held such questioning to fall within the category of "general on-the-scene" investigation not requiring the giving of warnings. See *Chavez-Martinez v. United States*, 407 F. 2d 535 (C.A. 9), certiorari denied, 396 U.S. 558; *Lowe v. United States*, *supra*. The same result is warranted here.

This case, moreover, is not like *Dickerson, supra*. Whatever the merits of *Dickerson* in the tax field,⁸ where an individual may be unaware of the criminal aspects of an investigation, the reasons for its application do not apply to an INS agent's request to see an alien's registration receipt card. There is no possi-

⁸ See Note, *Extending Miranda to Administrative Investigations*, 56 Va. L. Rev. 690, 691 (1970), which points out that the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits all have refused to apply *Miranda* to non-custodial tax investigations.

bility of misapprehension as to the criminal implications of such a request, since non-possession is itself an offense (8 U.S.C. 1304(e)).

In short, the decision of the court below unwarrantably extends *Miranda* to a situation where there is neither a coercive atmosphere nor a possibility of confusion which could cause an individual to incriminate himself.

2. Regardless of whether respondent was in "custody," we contend alternatively that the agents had a right to demand production of his alien registration card under the "required records" principle. *Marchetti v. United States*, 390 U.S. 39, 55-57; *Shapiro v. United States*, 335 U.S. 1, 32-35; *Davis v. United States*, 328 U.S. 582, 589-591. Under that principle the Fifth Amendment does not bar compulsory production of a document which the government requires to be kept in the exercise of a legitimate governmental regulatory function that is not directed at a "selective group inherently suspect of criminal activities." Cf. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79.

Under the Immigration and Nationality Act, all aliens who remain in the United States more than thirty days must register if they have not done so prior to entry. 8 U.S.C. 1302, 1306. Registration forms require the alien to give detailed information concerning himself, his entry into the United States and his expected length of stay. 8 U.S.C. 1304(a); 8 CFR 264.1 (a). Every alien who registers is issued some kind of evidence that he is qualified to be in the United States

in a designated immigration status. 8 U.S.C. 1303, 1304(d). The alien registration receipt card in question here, popularly known as a "green card," is issued to aliens admitted to the United States for permanent residence. 8 CFR 264.1(b).⁹ It contains the alien's picture and other identifying information, as well as certification of his immigrant status. 8 CFR 264.1. Strict control over "green cards," as well as other forms of evidence of registration, is maintained. Every alien over eighteen must carry his card with him at all times; failure to do so is a misdemeanor. 8 U.S.C. 1304(e). If he loses his card, he must immediately apply for a new one. 8 CFR 264.1(e). If the alien is naturalized, dies, permanently departs or is deported from the United States, or if a lost card is found, the card must be surrendered to the Immigration Service. 8 CFR 264.1(d).

The court of appeals acknowledged that the requirement that an alien carry evidence of registration serves the legitimate governmental interest of immigration control, and is "in the non-criminal regulatory area of inquiry" (App. A, *infra*, p. 20). It ruled, nevertheless, that the registration card did not fall within the "required records" principle. It concluded that the card was a private document which an alien would not keep but for the requirement of the regulatory scheme that he do so. We believe that

⁹Other types of "evidence of registration" include crewman landing permits and identification cards, border crossing cards, and arrival-departure records for nonimmigrant aliens. 8 CFR 264.1(b).

this conclusion rests upon untenable distinctions. An alien registration card is just as public as the gasoline ration coupons held to be "required records" in *Davis v. United States, supra*, or the business records involved in *Shapiro v. United States, supra*. Nor is there any basis for the restriction that "required records" can be only those which would be kept in the absence of the regulatory scheme; that was not the case in *Davis*, and such a limitation would be patently inconsistent with effective regulation in many areas. Carried to the extent of its logic, such a principle would establish a Fifth Amendment barrier to the enforcement of any licensing scheme.

The anomaly of the refusal of the court below to treat an alien registration card as a "required record" wholly outside the scope of the self-incrimination clause is shown by the basis on which the court finally resolved the issue. It was only because the agents asked to see respondent's card for a second time that the court found a Fifth Amendment problem; the privilege would not apply, it held, for reasons that are not clearly articulated, "in the normal immigration inquiry situation" (App. A., *infra*, p. 20). A "normal" inquiry, the court suggested, is one where the agents seek to determine whether a person is properly in the country; it is different, however, when the agents are looking further to determine whether an alien's card is forged, as respondent's turned out to be. But it is evident that an alien is not lawfully in the country if he relies on a forged card, so that

the inquiries cannot meaningfully be separated. And whether or not the card is a required record is not something that could rationally have changed between the first and the second inspection.

The result of the treatment of the self-incrimination issue by the court below is thus to create considerable uncertainty in an area where clear working rules are needed. This Court should resolve that uncertainty.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1970.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

No. 17645

September Term, 1969—April Session, 1970

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DIMAS CAMPOS-SERRANO, DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

June 25, 1970

Before HASTINGS, *Senior Circuit Judge*, and KILEY
and KERNER, *Circuit Judges*.

KERNER, *Circuit Judge*. Defendant Dimas Campos-Serrano was indicted for violation of 18 U.S.C. § 1546, knowing possession of a forged alien registration receipt card. He was tried without a jury and was found guilty. From this verdict, he appeals.

On November 19, 1968, agents of the Immigration and Naturalization Service (INS) conducted an investigation of an area in the City of Chicago where it was suspected that aliens who were improperly in the country were working. Agents Jacobs and Burrow having arrested Manuel Rico, accompanied him to his apartment in order that he could obtain his personal belongings. When they arrived at the apartment, the

defendant Campos-Serrano opened the door. The agents explained that Rico had been arrested but was being allowed to gather up his clothing. Agent Jacobs asked the defendant where he was from and when he said Mexico, Jacobs asked for identification. The agent was given an alien registration receipt card and a Social Security card. He was also asked for his passport but he said it was in Mexico. Jacobs examined the alien registration receipt card and showed it to Agent Burrow. The documents were returned to the defendant and the agents left with Rico. Outside the apartment Burrow stopped Jose Rodriguez Ortiz. Upon questioning, he produced an alien registration receipt card which was altered. Agents Burrow and White accompanied Ortiz to his apartment to obtain his personal property; which was the same place Rico and the defendant lived. Upon entering the apartment, Burrow asked the defendant to produce his alien registration receipt card a second time. Burrow examined the card further under better light and discovered it was altered. The defendant was arrested. Defendant moved for suppression of the alien registration receipt card on the grounds that he was not advised of his constitutional rights and the motion was denied.

Defendant attacks the indictment on the grounds that 18 U.S.C. § 1546 does not apply to forged alien registration receipt cards because an alien registration receipt card is not an "immigrant or non-immigrant visa, permit or other document required for entry into the United States." 18 U.S.C. § 1546. We disagree. In 1924, Congress passed a statute which provided for the issuance of temporary reentry permits to facilitate the departure of aliens who were leaving the United States on a temporary basis. Act of May 26, 1924, ch. 190, § 10, 43 Stat. 158. The

permits were to be surrendered upon return. Section 22 of the 1924 Immigration Act provided penalties for forging immigration visas and permits. *Id.* § 22, 43 Stat. 165. The reentry permits were included in the definition of permit by statute. *Id.* § 28(k), 43 Stat. 169.

Alien registration receipt cards were first issued under the Immigration Act of June 28, 1940. Act of June 28, 1940, ch. 439, § 31, 54 Stat. 673-74. Further, the same statute authorized the use of border crossing identification cards as entry documents. *Id.* § 30, 54 Stat. 673. In 1946, the alien registration receipt card was changed by regulation to include the same information as was contained in a Resident Alien's Border Crossing Identification Card and either was accepted upon entry into the country. 17 Fed. Reg. 4921 (May 30, 1952).

In 1948, Section 22 was repealed but was reenacted in modified form as 18 U.S.C. § 1546, which provided in part: "Whoever knowingly forges, counterfeits, alters or falsely makes any immigration visa or permit. . . ." The INS regulation stated:

(h) The term "permit to enter" means an immigration visa, a reentry permit, a passport visa, a transit certificate, a limited-entry certificate, a border crossing identification card, or a crew-list visa, issued by a permit-issuing authority.

8 CFR 175.41 subpara. (h)(1952).

An alien registration receipt card is included in this definition since it could be used as a reentry permit. In 1952, 18 U.S.C. § 1546 was modified such that "immigrant or non-immigrant visa, permit, or other document required for entry into the United States" was substituted for "immigration visa or permit." In so doing, Congress was expanding the definition of

forged documents being used to enter the United States. Since alien registration receipt cards were being used for entry previously, we think it was Congress' intention that they be included in § 1546. We do not think it was necessary for the statute to include "reentry" as well as entry permits. Section 22 of the Act of 1924 included reentry permits within the definition of "permit" and we find no clear intention on the part of Congress to diminish this definition. Rather, we find that Congress intended to expand the scope of documents being covered in 18 U.S.C. § 1546.

We do not accept the argument of the defendant that Congress sought to cover possession of forged alien registration receipt cards in 8 U.S.C. §1306(d). Section 1306(d) covers the act of counterfeiting and forging the cards while §1546 is directed to their use for the purpose of entering the United States illegally. Further we find no support for the defendant in *Lau Ow Bew v. United States*, 144 U.S. 47 (1892), where the Supreme Court was specifically concerned with the Chinese Exclusion Act of 1882. To the extent that *McFarland v. United States*, 19 F. 2d 807 (6th Cir. 1927), implies a different result, we disagree. See *United States v. Mouyas*, 42 F. 2d 743, 744 (S.D. N.Y. 1930).

We conclude that indictment under 18 U.S.C. §1546 for possession of a forged alien registration receipt card was proper.

Defendant claims that the agents failed to give him *Miranda* warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966), before asking him to produce his alien registration card the second time. For *Miranda* to apply, the documents or papers must be protected by the fifth amendment. *United States v. Webb*, 398 F. 2d 553,

556 (4th Cir. 1968), and this is the initial inquiry we must make.

An alien 18 years and older is required to have in his possession "any certificate of alien registration or alien registration receipt card" at all times. 8 U.S.C. § 1304(e). In *Shapiro v. United States*, 335 U.S. 1 (1948), the Court concluded that the fifth amendment privilege does not apply to documents which are kept in the normal operation of the business and also required to be kept for examination under the Emergency Price Control Act. The Court in *Marchetti v. United States*, 390 U.S. 39 (1968), declined to reassess *Shapiro* but rather distinguished it on the basis that the three elements discussed in *Shapiro* were not satisfied: (1) "obliged to keep and preserve records 'of the same kind as he customarily kept;'" (2) "public aspects;" and (3) "'an essentially non-criminal and regulatory area of inquiry.'" *Marchetti, supra*, at 57. Alien registration receipt cards are not customarily kept. If the government did not require possession of the cards, aliens would not keep them in their normal course of affairs since they are not business records. Further, the cards do not come within the phrase "public aspects." The suggested meaning of "public aspects" is records which are usually known to the public in general rather than records which are essentially personal to the individual. *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 95, 201 (1968).

The compulsion that is constitutionally forbidden is a coercion which forces the individual to give open manifestation to thoughts or conduct that would not ordinarily be expressed in a concrete form available to a significant number of people. Thus, for purposes of defining

the limits of the privilege against self-incrimination, the determining factor is whether the information sought is of such a nature that it would come into independent existence in the absence of government compulsion.

Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Col. L. Rev. 681, 694 (1965).

Cards which disclose whether an individual is an alien are private and the fact that public officials may require that they be kept does not make them public. *Marchetti v. United States, supra* at 57; *The Supreme Court, 1967 Term, supra*. As to the last element, alien registration receipt cards fall in the non-criminal regulatory area of inquiry. The purpose is essentially for the government to be aware of the number of aliens in the country and their status. Cf. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

Since the purpose of these cards is non-criminal, the fifth amendment privilege should not prevent production in the normal immigration inquiry situation. Cf. *United States v. Sullivan*, 274 U.S. 259 (1927). Here the initial inquiry to determine whether the defendant was properly in this country did not violate his fifth amendment privilege. However, when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged "cards" and the defendant's card had previously been examined, the privilege should apply. An individual should not be compelled to produce the crime itself. Otherwise, it would be the same as the agents compelling the individual to say: "I did it." Here, production of a forged card was sufficient without more to convict the defendant of possession of

forged entry documents under 18 U.S.C. § 1546 and the defendant's fifth amendment protection should have been respected by the agents.

The government contends that the "card" is not testimonial evidence but physical evidence under *Schmerber v. California*, 384 U.S. 757 (1966), and *Gilbert v. California*, 388 U.S. 263 (1967). Physical evidence in those cases includes evidence which is used for the purpose of identification of a defendant. Since the two justifications for the fifth amendment privilege are "(1) preservation of official morality, and (2) preservation of individual privacy . . ." McKay, *Self-Incrimination and the New Privacy, The Supreme Court Review—1967*, at 193, 214, physical evidence is not protected. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that private papers subject to a subpoena were protected by the fifth amendment. Such papers might contain some sort of personal confession of a defendant and are different from handwriting exemplars which may be used to identify a defendant but may not be admitted for their content. To force an individual to produce papers which are unknown to the public would violate his right of privacy. An alien registration receipt card is similar to the private papers in *Boyd*. As we said previously, the cards do not fall within the framework of "public aspects" as used by the Court in *Marchetti*. Here, introduction of the forged card which was in defendant's possession is *prima facie* evidence of violation of 18 U.S.C. § 1546 and the only effective evidence defendant could produce in rebuttal would be for him to testify. Thus, he is being forced to waive his fifth amendment privilege. See *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 112, 116-17 (1967).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that an individual must be advised of his

constitutional rights when the interrogation is custodial in nature. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Custodial interrogation may occur outside the surroundings of a police station as in *Orozco v. Texas*, 394 U.S. 324, 326-27 (1969), where the defendant was questioned by police officers in his bedroom at 4:30 in the morning. In *Dickerson v. United States*, 413 F. 2d 1111 (7th Cir. 1969), this court held that *Miranda* warnings must be given at the beginning of an Internal Revenue Service criminal investigation.

We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. . . . [I]t is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe.

413 F. 2d at 1114-16.

We think that the case before us falls in between the custodial interrogation in *Orozco* and the non-custodial interrogation in *Dickerson*. Here the defendant was asked to produce his card a second time by the same agent. At both times, the agents were accompanied by a roommate of the defendant who was in custody

of the agents and who was told to gather up his belongings. We think that the circumstances created an overbearing atmosphere which was sufficient to satisfy the requisite degree of compulsion required by the fifth amendment. *Miranda v. Arizona, supra.*

For the foregoing reasons we think that the defendant should have been given *Miranda* warnings before he was asked to produce his alien registration receipt card a second time. Since the warnings were not given, the forged card should not have been admitted into evidence. Therefore, we reverse and remand this case to the district court for further proceedings consistent with this opinion.

We wish to thank Mr. John J. Cleary, as court-appointed counsel, who was assisted on the brief by Mr. John D. Shullenberger, for their excellent service to the court in behalf of the defendant-appellant.

REVERSED AND REMANDED.

APPENDIX B

United States Court of Appeals for the Seventh
Circuit, Chicago, Illinois 60604

No. 17645

Thursday, June 25, 1970

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DIMAS CAMPOS-SERRANO, DEFENDANT-APPELLANT

*Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division*

Before Honorable JOHN S. HASTINGS, Senior Circuit
Judge; Honorable ROGER J. KILEY, Circuit Judge;
Honorable OTTO KERNER, Circuit Judge.

This cause came on to be heard on the transcript of
the record from the United States District Court for
the Northern District of Illinois, Eastern Division, and
was argued by counsel.

On consideration whereof, it is ordered and ad-
judged by this court that the judgment of the said
District Court in this cause appealed from, be, and the
same is hereby, Reversed, and that this cause, be, and
it is hereby Remanded to the said District Court for
further proceedings consistent with the opinion of this
Court filed this day.

APPENDIX C

United States Court of Appeals for the Seventh
Circuit, Chicago, Illinois 60604

No. 17645

Thursday, October 1, 1970

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.

DIMAS CAMPOS-SERRANO, DEFENDANT-APPELLANT

*Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division*

Before Hon. LUTHER M. SWYGERT, Chief Judge *
Hon. JOHN S. HASTINGS, Senior Circuit Judge,
Hon. ROGER J. KILEY, Circuit Judge **, Hon.
THOMAS E. FAIRCHILD, Circuit Judge*, Hon. WAL-
TER J. CUMMINGS, Circuit Judge**, Hon. OTTO
KERNER, Circuit Judge**, Hon. WILBUR F. PELL,
JR., Circuit Judge*

As all members of the panel (Judges Hastings,
Kiley and Kerner) voted to deny the petition for
rehearing filed by the government in the above en-
titled matter, it is ordered that the said petition for
rehearing be, and the same is hereby, denied.

On the government's suggestion for rehearing *en banc*, since a majority of the Judges in active service
did not vote to grant a rehearing *en banc*, the suggestion
is therefore DENIED.

* Judges Swygert, Fairchild and Pell voted to grant the
suggestion for hearing *en banc*.

** Judges Kiley, Cummings and Kerner voted to deny the
suggestion for rehearing *en banc*.

INDEX

	Page
Opinion below-----	1
Jurisdiction-----	1
Questions presented-----	2
Statement-----	2
Argument-----	6
Introduction and summary:	
I. Alien registration receipt cards are required records the production of which cannot be resisted on self-incrimination grounds-----	9
A. The development of the required records doctrine-----	9
B. Whatever the limits of the required records doctrine, it encompasses alien registration receipt cards-----	17
II. Even if respondent did have a privilege to withhold his alien card, the circumstances of the agents' request were not such as to require <i>Miranda</i> warnings-----	28
Conclusion-----	36

CITATIONS

Cases:

<i>Agius v. United States</i> , 413 F. 2d 915, certiorari denied, 397 U.S. 992-----	31
<i>Albertson v. Subversive Activities Control Board</i> , 382 U.S. 70----- 6, 13, 14, 17	31
<i>Au Yi Lau, et al. v. Immigration and Naturalization Service</i> , No. 23,339, C.A.D.C., decided March 19, 1971----- 34-35	34-35
<i>Boyd v. United States</i> , 116 U.S. 616----- 7, 10	7, 10

(1)

Cases—Continued

	Page
<i>Chavez-Martinez v. United States</i> , 407 F. 2d 535, certiorari denied, 396 U.S. 858-----	34
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72-----	10
<i>Davis v. United States</i> , 328 U.S. 582-----	6,
	7, 10, 11, 12, 13, 17, 24, 25
<i>Grosso v. United States</i> , 390 U.S. 62-----	25
<i>Hicks v. United States</i> , 382 F. 2d 158-----	33
<i>Lowe v. United States</i> , 407 F. 2d 1391-----	31, 34, 35
<i>Mackey v. United States</i> , No. 36, O.T., 1970, decided April 5, 1971-----	22, 28
<i>Marchetti v. United States</i> , 390 U.S. 39-----	6,
	7, 8, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25
<i>Mathis v. United States</i> , 391 U.S. 1-----	29
<i>Miranda v. Arizona</i> , 384 U.S. 436-----	2,
	5, 6, 8, 9, 28, 29, 31, 32, 34, 35
<i>Orozco v. Texas</i> , 394 U.S. 324-----	8, 29, 30
<i>People v. Creedon</i> , 281 N.Y. 413, 24 N.E. 2d 105-----	12
<i>People v. Schneider</i> , 139 Mich. 673, 103 N.W. 172-----	12
<i>Shapiro v. United States</i> , 335 U.S. 1-----	6,
	7, 11, 12, 13, 16, 17, 18, 25, 26
<i>Terry v. Ohio</i> , 392 U.S. 1-----	35
<i>United States v. Charpentier</i> , No. 340-70, C.A. 10, decided February 24, 1971-----	34
<i>United States v. Curry</i> , 428 F. 2d 785-----	23
<i>United States v. De La Cruz</i> , 420 F. 2d 1093-----	31
<i>United States v. Dickerson</i> , 413 F. 2d 1111-----	8, 30
<i>United States v. Dryden</i> , 423 F. 2d 1175, certiorari denied, 398 U.S. 950-----	23
<i>United States v. Fricano</i> , 416 F. 2d 434-----	23
<i>United States v. Gibson</i> , 392 F. 2d 373-----	34
<i>United States v. Hall</i> , 421 F. 2d 540, certiorari denied, 397 U.S. 990-----	31, 33
<i>United States v. Hill</i> , 430 F. 2d 129-----	23

Cases—Continued

	Page
<i>United States v. Hunt</i> , 419 F. 2d 1, certiorari denied, 397 U.S. 1016	23
<i>United States v. Jaskiewicz</i> , 433 F. 2d 415, certiorari denied, No. 884, O.T. 1970, January 27, 1971	30-31
<i>United States v. Kordel</i> , 397 U.S. 1	10
<i>United States v. Kurfess</i> , 426 F. 2d 1017, certiorari denied, 400 U.S. 830	34
<i>United States v. LeQuire</i> , 424 F. 2d 341	34
<i>United States v. Montez-Hernandez</i> , 291 F. Supp. 712	24, 34
<i>United States v. Montos</i> , 421 F. 2d 215	31
<i>United States v. O'Brien</i> , 391 U.S. 367	20
<i>United States v. Olson</i> , 253 Fed. 233	22
<i>United States v. Perez</i> , 426 F. 2d 799, certiorari denied, 400 U.S. 841	23
<i>United States v. Prudden</i> , 424 F. 2d 1021	31
<i>United States v. Reeves</i> , 425 F. 2d 1063	23
<i>United States v. Sacco</i> , 428 F. 2d 264, certiorari denied, 400 U.S. 903	23
<i>United States v. Tobin</i> , 429 F. 2d 1261	31, 34, 35
<i>United States v. Toussie</i> , 410 F. 2d 1156, reversed on other grounds, 397 U.S. 112	22
<i>United States v. Sullivan</i> , 274 U.S. 259	14
<i>United States v. Vaught</i> , 434 F. 2d 124, certiorari denied, No. 1206, O.T., 1970, March 22, 1971	23
<i>United States v. Walden</i> , 411 F. 2d 1109, certiorari denied, 396 U.S. 931	23
<i>United States v. Webb</i> , 398 F. 2d 553	22
<i>United States v. White</i> , 322 U.S. 694	10
<i>United States v. Whitehead</i> , 424 F. 2d 446	23
<i>Wilson v. United States</i> , 221 U.S. 361	9, 10, 12
<i>Windsor v. United States</i> , 389 F. 2d 530	31

Statutes and regulations:

	Page
8 U.S.C. 1301	18-19
8 U.S.C. 1302	19
8 U.S.C. 1303	19
8 U.S.C. 1304(a)	19
8 U.S.C. 1304(d)	19, 24
8 U.S.C. 1304(e)	19, 24
8 U.S.C. 1306	19, 30
8 U.S.C. 1325	30
8 U.S.C. 1357(a)(1)	3, 20, 24, 34
18 U.S.C. 545	23
18 U.S.C. 1546	2, 30
8 CFR 264.1	19
8 CFR 264.1(a)	19
8 CFR 264.1(b)	19
8 CFR 264.1(c)	19
8 CFR 264.1(d)	19

Miscellaneous:

Gordon & Rosenfield, <i>Immigration Law and Procedure</i> , Section 5.2(b)	35
Mansfield, <i>The Albertson Case: Conflict Between The Privilege Against Self-Incrimination and the Government's Need for Information</i> , 1966 Sup. Ct. Rev. 103	22
McKay, <i>Self-Incrimination and the New Privacy</i> , 1967 Sup. Ct. Rev. 193	14, 26, 27
1970 Annual Report of the Attorney General	18
Note, <i>Required Information And The Privilege Against Self-Incrimination</i> , 65 Col. L. Rev. 681 (1965)	21
Note, <i>The Supreme Court, 1967 Term</i> , 82 Harv. L. Rev. 63	26-27

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1028

UNITED STATES OF AMERICA, PETITIONER

v.

DIMAS CAMPOS-SERRANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 124-129) is reported at 430 F. 2d 173.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1970. A petition for rehearing with suggestion for rehearing *en banc* was denied on October 1, 1970. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 30, 1970. The petition was filed on November 30 and was granted on March 1, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien registration card is a "required record" which an alien must produce upon request by an appropriate government official.
2. Whether the court below unduly extended *Miranda v. Arizona*, 384 U.S. 436, by holding, on the facts of this case, that agents of the Immigration and Naturalization Service were required to give respondent warnings before asking him to produce his alien registration card.

STATEMENT

After a trial in the United States District Court for the Northern District of Illinois, at which respondent waived a jury, he was convicted of having knowingly possessed a forged alien registration receipt card, in violation of 18 U.S.C. 1546. On March 4, 1969, he was sentenced to a prison term of three years, which was suspended. He was placed on probation on condition that he return to Mexico and not reenter the United States illegally (App. 116-117).¹ The court of appeals reversed on the ground that the forged card had been illegally obtained by the government and was thus inadmissible in evidence (App. 124-129).

The pertinent facts, which are not in dispute, were developed at a pretrial hearing on respondent's motions to suppress the card and certain statements (App. 16-94). In the early morning of November 19,

¹ Respondent was remanded to the custody of the Immigration and Naturalization Service pursuant to a previous order of deportation entered in November 1968 (App. 117).

1968, a number of agents of the Immigration and Naturalization Service (INS) conducted an investigation in an area of Chicago where it was suspected that aliens unlawfully in the United States were working (App. 18-19).² They arrested some fifteen or sixteen aliens, including one Miguel Rico, for being in the United States in violation of the immigration laws (App. 21-22).

Rico was arrested at approximately 8:00 a.m. (App. 22) and afforded the opportunity to return to his residence to obtain personal belongings. (App. 33-34). When Rico arrived at his apartment, accompanied by INS investigators Jacobs and Burrow, they were admitted by respondent (App. 23-24). Upon entering, the agents immediately advised respondent that Rico was under arrest and was merely being allowed to obtain his belongings (App. 34-36). Burrow went with Rico to his room (App. 43). Jacobs, who remained in the living room with respondent, inquired as to respondent's citizenship. Respondent replied that he was Mexican. Jacobs next asked under what status respondent was in the United States. When respondent answered that he was a resident alien, Jacobs asked for "proof". In response, respondent produced an alien registration receipt card.³ Jacobs inspected this

² Under Section 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(1), immigration investigators are authorized without a warrant to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."

³ Jacobs also asked to see respondent's passport, but respondent explained that he had sent it to Mexico for fear of losing it (App. 27).

document as well as a social security card which respondent produced, and showed them to Burrow. Finding nothing amiss, the agents returned the documents to respondent.⁴ They then departed with Rico (App. 26-28, 35-37, 43-44).

When they returned to the car, a third investigator, White, suggested a check of another individual approaching them (App. 56-57). Burrow spoke to the individual, Jose Rodriguez-Ortiz, and inquired as to his citizenship. He produced an alien registration receipt card which, upon examination, Burrow and White determined to have been altered (App. 45-46). They then placed Rodriguez-Ortiz under arrest, and White and Burrow went with him to obtain his personal belongings (App. 30-32, 46-48). Rodriguez-Ortiz led them to the same apartment in which Burrow and Jacobs had encountered respondent. Rodriguez-Ortiz opened the door with a key (App. 57). Upon entering, the agents advised respondent that their purpose was to permit the new arrestee to gather his clothing (App. 48). While they waited, Burrow, who was by now suspicious that respondent's card might be altered, asked him to produce his alien registration receipt card a second time (App. 48, 50). After examining it under better lighting conditions and with a flashlight, Burrow and White concluded that respond-

⁴ Jacobs testified that the apartment was poorly lighted (App. 37).

ent's card had been altered (App. 52, 60).⁵ He was arrested, given *Miranda* warnings, and transported to the INS offices (App. 52, 58).

The trial judge declined to suppress the card, deeming it to have been voluntarily surrendered for examination on both occasions (App. 93), and subsequently found respondent guilty as charged. The court of appeals reversed, holding that the INS investigators had violated respondent's Fifth Amendment privilege against compulsory self-incrimination by failing to give *Miranda* warnings prior to their second request to examine his alien registration receipt card. The court acknowledged that the "privilege should not prevent production in the normal immigration inquiry situation" since the cards serve the non-criminal purpose of enabling the government "to be aware of the number of aliens in the country and their status" (App. 127). It accordingly held that the first request for respondent's card was valid. The court viewed the second request differently, stating that "when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged 'cards' and the defendant's card

⁵ Evidence was introduced at trial that the card had originally been issued to one Diana Gloria Vargas-Garcia, who had applied for a new card (App. 110-112).

⁶ The judge did suppress post-arrest admissions by respondent on the ground that they were made during a period of unnecessary delay in bringing him before a committing magistrate (App. 88-93).

had been previously examined, the privilege should apply" (*ibid.*). The court further concluded that respondent was "in custody" within the meaning of *Miranda v. Arizona*, 384 U.S. 436, when the agent asked to see his card the second time, and therefore that warnings were necessary (App. 128-129).

The government's petition for rehearing *en banc* was denied by a 3-3 vote of the active judges of the court of appeals (App. 130).

ARGUMENT

INTRODUCTION AND SUMMARY

1. The government's basic contention is that an alien registration receipt card is not subject to the protection of the Fifth Amendment privilege against self-incrimination. It is, rather, a public document, like a driver's license or a selective service card, which must be maintained by the individual and produced upon request by appropriate governmental agents under the "required records" doctrine. See *Marchetti v. United States*, 390 U.S. 39, 55-57; *Shapiro v. United States*, 335 U.S. 1, 32-35; *Davis v. United States*, 328 U.S. 582, 588-591. We submit that the privilege against self-incrimination has no application to such documents and the information they contain because the requirement of maintenance and disclosure serves a legitimate governmental regulatory function which is not "directed at a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79.

The court below, recognizing these factors, agreed that "the fifth amendment privilege should not prevent production [of the card] in the normal immigration inquiry situation" (App. 127).⁷ It accordingly held that the privilege did not apply to the INS agent's first request for respondent's card. The court interpreted this Court's recent discussion of the "required records" doctrine in *Marchetti*, however, to bring the card within the Fifth Amendment's protection when the agent, then directing his inquiry "at determining a criminal violation" (*ibid.*), asked to see the card again. We submit that this analysis is both anomalous and erroneous. In short, the alien registration receipt card must be either a "required record" or not, whenever requested; and, we believe, it is such a document under this Court's decisions.

The court of appeals, in our view, did not properly interpret *Marchetti*. We do not read that decision as altering the "required records" doctrine as it had developed and been applied in earlier decisions such as *Shapiro* and *Davis*. And under the fully developed doctrine, we submit it is plain that the "required records" doctrine applies to alien registration receipt cards.

⁷ We do not take issue with the court of appeals' determination that the Fifth Amendment privilege against self-incrimination is an appropriate basis on which to analyze demands, such as this, for the production of documents and information. It is true, of course, that the Fourth Amendment, as well as the Fifth, is pertinent in assessing the individual interest in privacy which is involved whenever such demands are made. See *Boyd v. United States*, 116 U.S. 616.

It is appropriate, therefore, to begin with consideration of the development of the required records doctrine and then turn to the effect of *Marchetti*. Finally, we shall apply the standards which we believe emerge from the several pertinent cases and which we feel are responsive generally to legitimate concerns with respect to the potential scope of governmental demands for information and documents.

2. Even if an alien registration receipt card is not a "required record," we contend that the immigration agent was not required, under *Miranda v. Arizona*, 384 U.S. 436, to advise respondent of his rights under the Fifth and Sixth Amendments before asking him to produce the card. The court below held that the agent should have given *Miranda* warnings prior to his second request for the card. It thus ruled, in effect, that defendant was then in "custody or otherwise deprived of his freedom of action in [a] significant way." 384 U.S. at 444.

The court relied upon this Court's decision and *Orozco v. Texas*, 394 U.S. 324 and its own decision in *United States v. Dickerson*, 413 F. 2d 1111 (C.A. 7). Neither of those cases, which are factually quite dissimilar from the present one, justifies the court's conclusion. The court's opinion does not clearly indicate, more generally, whether it based its ruling that respondent was significantly deprived of his freedom upon subjective factors, such as the attitude of the agent or the feelings of respondent, or upon an assess-

ment of the objective circumstances. We argue that an objective standard, which has been adopted by courts of appeals in several circuits, should be applied. Under an objective standard, we submit, *Miranda* warnings were not required here. The factor which evidently persuaded the court of appeals to require warnings was the suspicion of the agent. But suspicion of an officer is not, by itself, sufficient to create the atmosphere of compulsion which triggers application of *Miranda* and nothing else in this case created such a setting. The circumstances here, in sum, are analogous to those in many other law enforcement contexts in which officers have a duty to investigate and to which extension of *Miranda* would not be appropriate.

I. ALIEN REGISTRATION RECEIPT CARDS ARE REQUIRED RECORDS THE PRODUCTION OF WHICH CANNOT BE RESISTED ON SELF-INCRIMINATION GROUNDS

A. THE DEVELOPMENT OF THE REQUIRED RECORDS DOCTRINE

1. The "required records" doctrine had its origin in cases asserting the duty of a custodian of corporate records or other records of a quasi-public nature to produce them upon proper request. In *Wilson v. United States*, 221 U.S. 361, the Court held that a corporate officer could not assert the privilege against self-incrimination with respect to corporate records in his possession. It emphasized the public responsibilities of a corporation and analogized the case to numerous decisions which had refused to permit the custodian of records required by law to be kept to

withhold them, even though they might incriminate him. The court explained (221 U.S. 380):

The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

See also *United States v. White*, 322 U.S. 694 (same result as to records of unincorporated labor union); cf. *United States v. Kordel*, 397 U.S. 1.⁸

This Court specifically applied the principle to "required records" in custody of an individual businessman for the first time in *Davis v. United States*, 328 U.S. 582.⁹ Regulations of the Office of Price

⁸ The principle had been articulated earlier in *Boyd v. United States*, 116 U.S. 616. In that case, the Court held that a revenue statute which required an individual to produce private business records violated the Fourth and Fifth Amendments. It contrasted that situation to the permissible examination by revenue officers, in exercising control "over the manufacture or custody of excisable articles; * * * [of] the entries thereof in books required by law to be kept for their inspection." 116 U.S. at 623-624. See also *Colonnade Catering Corp. v. United States*, 397 U.S. 72.

⁹ The Court had, however, recognized its application to required records, irrespective of whether a business was incorporated, in *Boyd* and *Wilson*. *Wilson*, for example, cited several state cases which had refused to permit pharmacists to invoke the privilege with respect to sales of certain commodities as to which they were required to keep records. 221 U.S. at 381.

Administration required operators of filling stations to obtain gasoline ration coupons in connection with sales and to keep them at the place of business, subject to examination. Davis was arrested for selling gasoline at black market prices without receiving ration coupons from the purchasers. The arresting agents demanded that he surrender coupons in his possession for inspection, asserting that they were government property. After initially refusing to do so, Davis complied. The Court, marking "[t]he distinction * * * between property to which the Government is entitled to possession and property to which it is not," upheld the right of inspection. 328 U.S. at 588-590. It held (328 U.S. at 593):

Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of ~~right~~ right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents. *Wilson v. United States*, *supra*. The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here. * * *

The Court next considered the "required records" doctrine in *Shapiro v. United States*, 335 U.S. 1. Reg-

ulations of the Office of Price Administration required each wholesaler of fruit and produce to supply for inspection records, "of the same kind as he has customarily kept," regarding the prices he charged. 335 U.S. at 5, n. 3. It was argued that the "required records" principle should not apply to Shapiro's records because—in distinction to those in *Davis*—they were private noncorporate records rather than documents which the government required to be maintained specifically for a public purpose (see Petitioner's Brief 11-22, No. 49, O.T., 1947).¹⁰ The Court, expressly reaffirming *Wilson* and *Davis* (335 U.S. at 32-33), rejected this contention (335 U.S. at 34-35):

[I]t cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." * * * The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Administrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute.

The four dissenters in *Shapiro* expressed concern with the potential scope of governmental directives that records be made and preserved for inspection.

¹⁰ The government's brief in *Shapiro* (p. 19) cited several examples of cases where state courts had upheld application of the "required records" principle to documents which would not be "customarily kept." E.g., *People v. Schneider*, 139 Mich. 673, 103 N.W. 172 (displaying licenses on motor vehicles); *People v. Creeden*, 281 N.Y. 413, 24 N.E. 2d 105 (record of number of hours an operator of a truck or bus may be on duty).

The majority, also cognizant of the possibility of an abuse of power, "assumed" that there are constitutional limits to the scope of such directives, but went on to express the view (335 U.S. at 32) that—

[N]o serious misgiving that [these] bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection * * *.

The *Shapiro* decision evidently represented an expansion of the concept of "public records," establishing the principle that records maintained for private purposes may lose the protection they would otherwise have as private records if Congress provides that they shall be kept available for governmental inspection in connection with a legitimate regulatory scheme. It was that expansion—and not the more limited underlying doctrine of *Davis* with respect to documents created by the government for keeping by citizens engaged in regulated activity—that divided the *Shapiro* court. Similar considerations motivated the Court's subsequent decision in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, which—while not discussing the required records doctrine—imposed a limitation on the *Shapiro* principle. There the Court held that the privilege against self-incrimination protected the Communist Party against registration and disclosure of its membership list because

the disclosure requirement was "directed at a highly selective group inherently suspect of criminal activities" and did not focus on "an essentially non-criminal and regulatory area of inquiry * * *." 382 U.S. at 79.¹¹

2. Prior to this Court's decision in *Marchetti*, then, there were essentially two limitations under the Fifth Amendment on the government's power to require maintenance and disclosure of documents and information. The requirement had to serve a legitimate regulatory purpose, and it could not have the effect of compelling members of a group inherently suspect of criminal activities to disclose those activities.

Marchetti involved a statutory system for taxing and obtaining information from persons engaged in the gambling business. These persons were required to pay a special occupational and excise tax, to register annually with the Internal Revenue Service, and to supply detailed information about their business activities on a special form. They also were required to keep daily wagering records and to permit inspec-

¹¹ The *Albertson* court distinguished *United States v. Sullivan*, 274 U.S. 259. The Court held there that an individual could not, on grounds of self-incrimination, refuse entirely to file an income tax return, although it intimated that he might invoke the privilege as to specific questions. The questions on an income tax form, the Court noted in *Albertson*, were "neutral on their face and directed at the public at large." 382 U.S. at 79.

The validity of the suggestion that an individual might refuse to answer certain questions on his return is not entirely certain in light of cases subsequent to *Sullivan*. See McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 215, n. 95.

tion of their books of account. Criminal penalties were provided for wilful failures to pay the occupational tax and to register. 390 U.S. at 42-44. The Court held that the system created "real and appreciable" * * * hazards of self-incrimination" (390 U.S. at 48) for gamblers at whom it was directed and consequently that a timely claim of the Fifth Amendment privilege provides "a complete defense to * * * prosecution" under the statute (390 U.S. at 60).

The Court rejected the "required records" doctrine as a justification for the disclosure requirements. After discussing the facts of *Shapiro*, it concluded (390 U.S. at 56-57):

[N]either *Shapiro* nor the cases upon which it relied are applicable here. * * * Moreover, we find it unnecessary for present purposes to pursue in detail the question, left unanswered in *Shapiro*, of what "limits * * * the Government cannot constitutionally exceed in requiring the keeping of records * * *" 335 U.S. at 32. It is enough that there are significant points of difference between the situations here and in *Shapiro* which in this instance preclude, under any formulation, an appropriate application of the "required records" doctrine.

Each of the three principal elements of the doctrine, as it is described in *Shapiro*, is absent from this situation. First, petitioner Marchetti was not, by the provisions now at issue, obliged to keep and preserve records "of the same kind as he has customarily kept"; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not

significantly different from a demand that he provide oral testimony. * * * Second, whatever "public aspects" there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a "selective group inherently suspect of criminal activities." Cf. *Albertson v. SACB*, 382 U.S. 70, 79. The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers * * * but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*.

It is evident that the Court considered the disclosure required by this gambling tax scheme as a further extension of the kind of disclosure approved in *Shapiro*, requiring gamblers to collect for government inspection information characterized as unrelated even to the kind of records that a gambler would keep in the normal course of his business. The Court

thus considered this information as lacking "whatever public aspects there were to the records at issue in *Shapiro*," rejecting the government's desire to obtain information as a basis for calling that information "public". And the Court further explicitly incorporated the *Albertson* principle in the required records context, noting that gamblers fall into the "inherently suspect" category. But still there was nothing in *Marchetti* that cast doubt upon the basic principle recognized in *Davis*, that the production of unquestionably public documents can be required without infringement upon the privilege against self-incrimination.

B. WHATEVER THE LIMITS OF THE REQUIRED RECORDS DOCTRINE, IT ENCOMPASSES ALIEN REGISTRATION RECEIPT CARDS

Since, as we shall presently describe in greater detail, a valid alien registration receipt card is a document issued by the government to each alien that he is required to keep and produce upon proper request, such a card falls within the same category of required records as did the ration coupons at issue in *Davis*. It is issued as a necessary aspect of a valid regulatory scheme, and the class of persons—aliens—required to possess and produce such cards is not a class inherently suspect of criminal activities. Because of the purely governmental origin and nature of the document, its status as a required record does not raise the questions that troubled the Court in *Marchetti*, or even in *Shapiro*, concerning the outer limits of

governmental power to give records and information a public character removing them from the protection of the self-incrimination clause. For that reason, we do not believe that the additional prerequisite suggested in *Marchetti*—that records or information sought by the government be of the kind customarily kept by the person regulated in the normal course of his activities—has any application to this case; that factor is pertinent only in the context of *Marchetti* or *Shapiro*, where the documents to be produced reflect the collection of data by the producer for governmental use, rather than merely the display of a document issued by the government for a regulatory purpose.

1. Alien registration receipt cards are issued, and aliens are required to possess and produce them upon proper request, in the reasonable exercise of an important regulatory scheme—the control of immigration into the United States.¹²

Under the Immigration and Nationality Act, all aliens seeking visas for entry to the United States, as well as all aliens over fourteen remaining in the United States more than thirty days who did not register prior to entry, must file a registration form. 8

¹² As we pointed out in our petition, this is a problem of considerable magnitude. In 1970, more than 373,000 aliens were admitted to this country for permanent residence, more than 493,000 aliens returned from visits abroad, 3.4 million alien crewmen were granted shore leave, and 4.8 million other aliens visited here for temporary periods. Over 345,000 deportable aliens were found by the I.N.S. of whom more than 277,000, or 80 percent, were Mexicans. 1970 Annual Report of the Attorney General at 196.

U.S.C. 1301, 1302, 1306. The form requires the alien to give information concerning himself, his entry into the United States, and his expected length of stay. 8 U.S.C. 1304(a); 8 CFR 264.1(a). Every alien who registers and is admitted is then issued some kind of evidence that he is qualified to be in the United States in a designated immigration status. 8 U.S.C. 1303, 1304(d).¹³ The alien registration receipt card in question here, popularly known as a "green card," is issued to aliens admitted to the United States for permanent residence. 8 C.F.R. 264.1(b).¹⁴ It contains the alien's picture and other identifying information as well as certification of his immigrant status. 8 CFR 264.1; see App. 119, 120.

Strict control over "green cards" and other forms of evidence of registration is maintained. Every alien over eighteen must carry his card with him at all times. Failure to do so is a misdemeanor. 8 U.S.C. 1304(e). Any alien who loses his evidence of registration must immediately apply for new evidence thereof. 8 CFR 264.1(c). If the alien is naturalized, dies, permanently departs or is deported, the card must be surrendered to the Immigration Service, as must any lost card that is found. 8 CFR 264.1(d). The green card, and comparable documents issued to other

¹³ The card itself thus contains only information which is already in the government's possession. There is no question in this case that the information reflected on the card is information that the government is entitled to have.

¹⁴ Other types of "evidence of registration" include crewmen landing permits and identification cards, border crossing cards and arrival-departure records for nonimmigrant aliens. 8 C.F.R. 264.1(b).

classes of aliens, are normally the first source of inquiry (as in this case) made by immigration investigators pursuant to their statutory power "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. 1357 (a)(1). In short, a resident alien's green card is the identification document that evidences the lawfulness of his presence in the country.

The requirements of registration and maintenance of alien registration receipt cards for inspection thus facilitate the effective administration of the Immigration and Nationality Act, just as similar requirements with respect to drivers' licenses and selective service registration certificates serve valid functions in connection with motor vehicle laws and the operation of the Selective Service System. See *United States v. O'Brien*, 391 U.S. 367, 372-374, 377-380. A document issued by the government for such a purpose, subject to such reasonable requirements, plainly has the "public aspects" required to qualify it as a "required record."

In *Marchetti*, this Court properly observed that otherwise private records and information did not acquire "public aspects" merely because of the government's "anxiety to obtain information known to a private individual." 390 U.S. at 57. The court of appeals below translated this Court's brief discussion of "public aspects" in that context into an absolute condition that the government may require disclosure only of "records which are usually known to the public in general rather than records which are essentially personal to the indi-

vidual" and would not "come into independent existence in the absence of government compulsion." Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Col. L. Rev. 681, 694 (1965)" (App. 126-127). It then concluded that "[c]ards which disclose whether an individual is an alien are private and the fact that public officials may require that they be kept does not make them public" (App. 127).

Such an extrapolation from *Marchetti* ignores the crucial factor that here—as not in *Marchetti*—the kind of document in question has "public aspects" from the start, and indeed is issued by the government to the holder for valid regulatory purposes. The discussion in *Marchetti* related, in contrast, to information that the Court viewed as private but for the government's interest in learning it; thus, the underlying public nature of the document in question here was lacking there. *Marchetti* held only that the desire for such information "without more," 390 U.S. at 57, did not make it sufficiently "public;" but here there was plainly "more," as there had been in *Davis*.

2. The alien registration requirement obviously is not directed at a group which is inherently suspect of criminal activities. The court below did not suggest that the general class of aliens was suspect of illegal behavior. But it evidently believed that, when "inquiry * * * is directed at determining a criminal violation" of an individual, the privilege nevertheless is applicable. It is, however, only the nature of the class, and not the circumstance of a particular

member who may incriminate himself if he complies with a disclosure requirement, that is pertinent in determining whether the privilege may apply.¹⁵

Persons in a non-suspect group who choose to engage in activities amenable to governmental regulation, or who are called upon to perform a duty owed by them as citizens, are properly deemed to subject themselves to reasonable record-keeping conditions of that activity. See *Mackey v. United States*, No. 36, O.T., 1970, Mr. Justice Brennan, concurring, slip op. at 7-8; *United States v. Toussie*, 410 F. 2d 1156, 1159-1160 (C.A. 2), reversed on other grounds, 397 U.S. 112; *United States v. Webb*, 398 F. 2d 553, 556 (C.A. 4). Thus, the lower federal courts, in criminal cases subsequent to *Marchetti*, have uniformly refused to permit defendants to raise the Fifth Amendment privilege as a defense for failure to comply with the federal registration scheme relating to the liquor industry. They have held *Marchetti* inapplicable because persons engaged in the liquor business, unlike gamblers, are not inherently suspect of criminal activities, even though the registration requirement may compel a particular individual to reveal that his operations are illegal.

¹⁵ In World War I a conviction under a statute punishing failure to produce a selective service registration certificate upon demand was sustained against a claim, similar to that here, that compliance would have amounted to compulsory self-incrimination. *United States v. Olson*, 253 Fed. 233 (W.D. Wash.). See Mansfield, *The Albertson Case: Conflict Between The Privilege Against Self-Incrimination And The Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 125-127; *United States v. Toussie*, 410 F. 2d 1156, 1159-1160 (C.A. 2), reversed on other grounds, 397 U.S. 112.

E.g., United States v. Fricano, 416 F. 2d 434 (C.A. 2); *United States v. Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States v. Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States v. Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *United States v. Whitehead*, 424 F. 2d 446 (C.A. 6) (en banc); *United States v. Curry*, 428 F. 2d 785 (C.A. 9); *United States v. Reeves*, 425 F. 2d 1063 (C.A. 10). Similarly, lower courts have sustained the requirement of declaration of imported goods under 18 U.S.C. 545 because it serves principally a legitimate revenue purpose and is not directed at a class inherently suspect of criminal activities. *United States v. Perez*, 426 F. 2d 799 (C.A. 9), certiorari denied, 400 U.S. 841; *United States v. Vaught*, 434 F. 2d 124 (C.A. 9), certiorari denied, March 22, 1971 (No. 1206, O.T., 1970); *United States v. Hill*, 430 F. 2d 129, 132 (C.A. 5).

The same rationale was applied specifically to alien registration requirements in *United States v. Sacco*, 428 F. 2d 264 (C.A. 9), certiorari denied, 400 U.S. 903. That case involved conviction of an alien for failing to register and to notify the Attorney General annually of his address. The alien contended that these requirements violated the privilege against compulsory self-incrimination. The court held there was no Fifth Amendment problem, however, since the alien registration statutes "are 'essentially non-criminal and regulatory provisions.'" 428 F. 2d at 271. The *Sacco* decision applies equally to the requirement that aliens

carry their "evidence of registration" at all times. See 8 U.S.C. 1304(d), (e). Both requirements are designed to facilitate the identical non-criminal purpose of alien immigration control. And although compliance with them may result in criminal prosecution, this is neither the primary purpose nor the anticipated effect of the requirement in the vast majority of cases.¹⁶

3. As we have indicated, it is our view that the third element to which the *Marchetti* opinion referred in its discussion of the "required records" doctrine—whether records are of the kind "customarily kept"—is not relevant in the context of this case. We do not dispute the court of appeals' statement that "[i]f the government did not require possession of the cards, aliens would not keep them in their normal course of affairs since they are not business records" (App. 126). But we reiterate that the restriction to records of the kind customarily kept arose in the context of determining how far the principle underlying *Davis* could be extended by attributing a "public

¹⁶ The fact that respondent's card was forged makes no difference in terms of the "required records" doctrine. Since respondent held himself out, in response to lawful questioning, as an alien lawfully admitted for permanent residence, the INS agents were entitled to examine the "evidence of registration" on which he was relying. See 8 U.S.C. 1357(a)(1); *United States v. Montez-Hernandez*, 291 F. Supp. 712, 714-715 (E.D. Cal.). Similarly, police who stop a car for a traffic offense are entitled to demand production by the driver of whatever purported license he is carrying; the fact that the license is not his, or is forged, does not render the demand for it subject to the Fifth Amendment privilege.

aspect" to documents lacking a public origin. Application of such a requirement outside the special context of *Shapiro* and *Marchetti* is unwarranted and would lead to absurd results. Drivers' licenses and selective service cards, no less than alien registration receipt cards, are not customarily maintained in the absence of a governmental requirement. Most significant, the gasoline ration coupons at issue in *Davis v. United States*, *supra*, were kept only because of governmental regulations. Thus, acceptance of the court of appeals' analysis would seem to require overruling *Davis*; *Marchetti* plainly did not purport to do that. See 390 U.S. at 56-57; 72.

In any event, we do not read the Court's relatively brief discussion of the required records doctrine in *Marchetti* as establishing rigid rules for the application of that doctrine even in the context of records and information judged to be basically private. Rather, the Court found that the "points of difference in combination" between that case and *Shapiro* rendered the doctrine inapplicable there. 390 U.S. at 57. It did not state that the three elements necessarily must be present before the doctrine may apply any more than it stated that all must be absent before it will not apply.¹⁷ The presence of a valid regulatory purpose in a non-criminal area for inquiry of a class which is not inherently suspect of criminal activity

¹⁷ In the companion case, *Grosso v. United States*, 390 U.S. 62, the Court rejected application of the "required records" doctrine to the payment of the gambling excise tax although it acknowledged that "it might * * * be argued" that the records required to be kept in connection with this tax were "essen-

should, in our view, often suffice to justify application of the required records doctrine; certainly these factors are sufficient, as we have indicated, in the present case.

The evident danger of an excessive extension of the required records doctrine is that it will be employed to infringe unduly upon the privacy of the individual. See *Shapiro v. United States*, 335 U.S. 1, 70-71 (Mr. Justice Jackson dissenting); McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 206-214. What is fundamentally at issue is the potential conflict between the government's interest in securing information needed for effective operation of its many programs in the non-criminal area and the individual's right to privacy. It has been argued that the "customarily kept" factor adds "little to the 'public aspects' element and seems to bear no relation to the values protected by the fifth amendment." Note, *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 202. Whatever protection the requirement that records be of the kind "customarily kept" might provide

tially similar to those required to be preserved by the regulations in *Shapiro*," 390 U.S. at 68-69. Without deciding definitely whether those records were of the kind customarily kept, the Court, stressing the "other points of significant dissimilarity between this situation and that in *Shapiro*"—the lack of "public aspects" and the focus on an inherently suspect class—ruled "that in combination these points of difference preclude any appropriate application to these circumstances of the 'required records' doctrine." 390 U.S. at 69.

in some circumstances, its rigid application to every case would arbitrarily prevent the government from requiring disclosure of information which would not otherwise be made public but which is not of a highly personal nature and for which there is a significant need. Reports and records regarding various business and other activity which is validly subject to regulation and licensing could not be required under such an approach.

It is true that, under the "required records" doctrine, the protection of privacy will depend, to some extent as a practical matter, upon the exercise of congressional restraint. Cf. McKay, *supra*, p. 217. But there is no reason to believe that direct examination of the government's regulatory interests will not provide an appropriate basis upon which courts, when confronted with serious issues of invasion of privacy, may access the validity of the government's demands.

The qualification that a record-keeping requirement be directed at a general class, not inherently suspect of criminal activity, finally, provides a basic assurance against governmental overreaching at the expense of values protected by the Fifth Amendment. For this element excludes the possibility that government will be able, by purporting to advance regulatory goals, to establish what is, in fact, fundamentally a system of acquiring information respecting criminal violations by the simple expedient of forcing suspected individuals to admit their violations. Consequently, it will

restrict reporting requirements to areas where the basic interest is in the regulation of conduct and not its punishment. See *Mackey v. United States, supra*, Mr. Justice Brennan, concurring, slip. op. at 7-8.

II. EVEN IF RESPONDENT DID HAVE A PRIVILEGE TO WITHHOLD HIS ALIEN CARD, THE CIRCUMSTANCES OF THE AGENT'S REQUEST WERE NOT SUCH AS TO REQUIRE MIRANDA WARNINGS

1. Since respondent consented to produce his alien registration receipt card when the agents requested it, its use as evidence was valid even if it was protected by the privilege against self-incrimination. We submit that the court of appeals erred in holding that prior warnings under *Miranda v. Arizona*, 384 U.S. 436, were required for the protection of petitioner's privilege if he had one. The agents were not obliged to give warnings prior to either request because respondent was not in "custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Rather, the situation here is analogous to those which the Court in *Miranda* expressly indicated were not affected by its holding: "[g]eneral on-the-scene questioning as to [the] facts surrounding a crime or other general questioning of citizens in the fact-finding process * * * [where] the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477-478.

There are, of course, situations, between interrogation in the classic circumstances of arrest and cus-

tody¹⁸ and general questioning of citizens, in which the action of peace officers creates "inherently compelling pressures" on the individual "to speak where he would not otherwise do so freely." 384 U.S. at 444, 467. This Court has not, however, articulated a general standard in the variety of possible citizen-police encounters for determining whether a significant deprivation of freedom, equivalent to custody, has occurred.¹⁹

¹⁸ *Miranda* and its companion cases all presented classic "custodial" features—"incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." 384 U.S. at 445.

¹⁹ The court has twice since *Miranda* considered its application to particular facts. *Mathis v. United States*, 391 U.S. 1; *Orozco v. Texas*, 394 U.S. 324. In each case, however, the defendants were actually under arrest or in confinement. In each, the Court held that the warnings should have been given without elaborating standards to apply when custody is not so clearly present. In *Mathis*, the defendant was interrogated by an internal revenue agent while he was in a state prison serving a sentence on an unrelated matter. The Court found that the fact that the questioning was unrelated to the detention was "too minor and shadowy" a factor to distinguish the case from *Miranda* (391 U.S. at 4). In *Orozco*, four police officers, with probable cause to believe defendant was implicated in a homicide which had occurred a few hours previously, came to his home at 4:00 A.M. and questioned him in his bedroom about the killing. One of the officers testified that *Orozco* was "under arrest" and not free to leave. Relying on this testimony, the majority held that *Orozco* had been "in custody" and that *Miranda* warnings should have been given. It rejected the State's argument that, because *Orozco* was interrogated in his home in familiar surroundings, the *Miranda* holding did not apply. 394 U.S. at 326-327.

The court of appeals held that the circumstances in this case fell "between the custodial interrogation in *Orozco* and the non-custodial interrogation" in *United States v. Dickerson*, 413 F. 2d 1111 (C.A. 7) (App. 129).²⁰ The situation here is materially different from that in either of those cases, however. The requests for respondent's card came during normal hours, not, as in *Orozco*, in the middle of the night. Two officers were present, not four, and they had come—as they advised respondent—to accompany other persons, under arrest, while they gathered their belongings, not because of suspicion focused on respondent. Nor was there a realistic possibility that respondent was unaware of the possible criminal implications of the request for his card.²¹ Thus, whatever the merits of *Dickerson* in the tax field, where there is the possibility that an individual will misapprehend the nature of an investigation, that decision has no application here.²²

²⁰ In *Dickerson* the Seventh Circuit required that special agents of the Internal Revenue Service give *Miranda* warnings at the outset of any investigation despite the absence of any form of custody, because the taxpayer might be unaware of the possible criminal implications of the inquiry.

²¹ Illegal entry into the United States (8 U.S.C. 1325), willful failure to register (8 U.S.C. 1306), and knowing possession of a false entry document (18 U.S.C. 1546) are among the criminal offenses to which evidence regarding an alien's registration status are pertinent.

²² *Dickerson* has been rejected by every other court of appeals (the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits) which has considered the issue. E.g., *United*

2. It is not clear from the opinion below whether the court of appeals based its conclusion that there was sufficient "compulsion" to amount to "custody" upon subjective or objective factors.

The Fifth Circuit has often made its conclusion in such cases rest upon a determination whether officers have subjectively focused their investigation on the person questioned. See *Windsor v. United States*, 389 F. 2d 530 (C.A. 5); *Agius v. United States*, 413 F. 2d 915, 918-919 (C.A. 5), certiorari denied, 397 U.S. 992; *United States v. Montos*, 421 F. 2d 215, 223 (C.A. 5). See also *United States v. De La Cruz*, 420 F. 2d 1093, 1095-1096 (C.A. 7). Other courts of appeals, however, have employed a standard under which the objective circumstances, rather than subjective feelings of the police or the suspect, are examined in determining whether *Miranda* warnings are required. See *United States v. Hall*, 421 F. 2d 540, 543-545 (C.A. 2), certiorari denied, 397 U.S. 990; *United States v. Tobin*, 429 F. 2d 1261, 1263-1264 (C.A. 8); *Lowe v. United States*, 407 F. 2d 1391, 1396-1397 (C.A. 9). As the court in *Lowe* concluded (407 F. 2d at 1397):

Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make an arrest, either formed prior to, or during the questioning, this is not

States v. Jaskiewicz, 433 F. 2d 415, 417-420 (C.A. 3) certiorari denied, January 25, 1971 (No. 884, O.T., 1970); *United States v. Prudden*, 424 F. 2d 1021, 1025-1031 (C.A. 5).

a factor in determining whether there is present "in custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

We submit this is the proper standard, and that, under this standard, the immigration agent was not obliged to warn respondent of his Fifth Amendment rights.

The purpose of *Miranda* warnings is to dispel any "inherently compelling pressures" which might coerce an unwilling individual to speak. 384 U.S. at 467. The state of mind of the individual under questioning, not the state of mind of the officer, is pertinent in determining whether such pressures exist. And although the state of mind of the suspect is the relevant criterion, it is neither practical nor desirable to base a decision on whether warnings should be given on what the particular individual subjectively thought. It is the officer, after all, who must decide whether to advise an individual of his rights. He cannot be expected reasonably to base this decision on his guess regarding the subjective feelings of the individual, for different individuals may be affected in quite different ways by the same circumstances. For example, a man who knows he is guilty may feel much more compulsion than one who is certain he has nothing to fear. The officer must act, and courts ultimately should judge his decision, on the basis of "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." *Hicks v. United States*, 382 F. 2d 158, 161 (C.A. D.C.). Judge

Friendly ably summarized the difficulties of a standard based on subjective factors in *Hall, supra*, 421 F. 2d at 544:

The Court [in *Miranda*] could scarcely have intended the issue whether the person being interrogated had "been taken into custody or otherwise deprived of his * * * [freedom of action] in any significant way" to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses. On the other hand, a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned.

The court below appears to have been concerned with the effect of the agent's suspicion when he asked to see the card again (App. 127, 129). But the suspicion of an officer, regardless of the degree, is not by itself so inherently coercive as to constitute the equivalent of custody. As Judge Friendly pointed out in *Hall*, 421 F. 2d at 544:

Clearly the Court meant that *something* more than official interrogation must be shown [to require warnings]. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source. While the Court's language in *Miranda* was imprecise, doubtless deliberately so, it conveys a flavor of some affirmative action by the authorities other than polite interrogation. * * *

If suspicion alone sufficed to trigger the necessity for warnings, routine law enforcement activity, such as requesting an individual suspected of driving a stolen car to produce his driver's license or questioning persons at the border as to the nature of the goods they are bringing into the country, frequently could not take place without giving *Miranda* warnings. The courts of appeals have uniformly held such questioning to fall within the category of "general on-the-scene" investigation which does not require *Miranda* warnings.²³

Like customs agents, INS agents routinely ask numerous persons believed to be aliens about their

²³ E.g., *Loué v. United States*, 407 F. 2d 1391, 1394-1396 (C.A. 9); *United States v. LeQuire*, 424 F. 2d 341, 343-344 (C.A. 5); *United States v. Tobin*, 429 F. 2d 1261, 1263-1264 (C.A. 8); *United States v. Charpentier*, (C.A. 10), No. 340-70 decided February 24, 1971; *United States v. Gibson*, 392 F. 2d 373, 375-376 (C.A. 4); *Chavez-Martinez v. United States*, 407 F. 2d 535, 538-539 (C.A. 9), certiorari denied, 396 U.S. 858; *United States v. Kurfess*, 426 F. 2d 1017, 1020 (C.A. 7), certiorari denied, 400 U.S. 830.

right to be in the United States.²⁴ Particularly in view of the routine nature of this activity, it is unreasonable to conclude that the simple request that an alien produce evidence that he is lawfully in the United States creates, for the normal individual, an "overbearing atmosphere" equivalent to that he would face if arrested and taken into custody. Nor, we submit, is it any more reasonable to conclude, in the circumstances of this case, that the suspicious agent's second request for the card created such pressure for a reasonable man. Accordingly, we maintain that the court of appeals erred in concluding that the agent was required to give *Miranda* warnings prior to his requests to see respondent's alien registration card even if that card was protected under the Fifth Amendment.

²⁴ The power of INS agents to interrogate "any person believed to be an alien as to his right to be or remain in the United States" 8 U.S.C. 1357(a)(1) implies a limited authority to stop an individual for purposes of questioning. See *United States v. Montez-Hernandez*, 291 F. Supp. 712, 714-715 (E.D. Cal.); *Au Yi Lau, et al. v. Immigration and Naturalization Service*, No. 23,339, C.A.D.C., decided March 19, 1971; Gordon & Rosenfield, *Immigration Law and Procedure*, Section 5.2(b), pp. 5-11, and administrative cases cited at note 7d, 1970 Cum. Supp.

An individual who is temporarily detained under this power is not necessarily in custody or significantly deprived of his freedom of action within the meaning of *Miranda*, however. Police who stop and question persons in carrying out their general investigatory duties similarly are not under an obligation for that reason alone to give warnings. See, e.g., *United States v. Tobin, supra*, 429 F. 2d at 1263; *Lowe v. United States, supra*, 407 F. 2d at 1394-1396; cf. *Terry v. Ohio*, 392 U.S. 1.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the judgment of conviction reinstated.

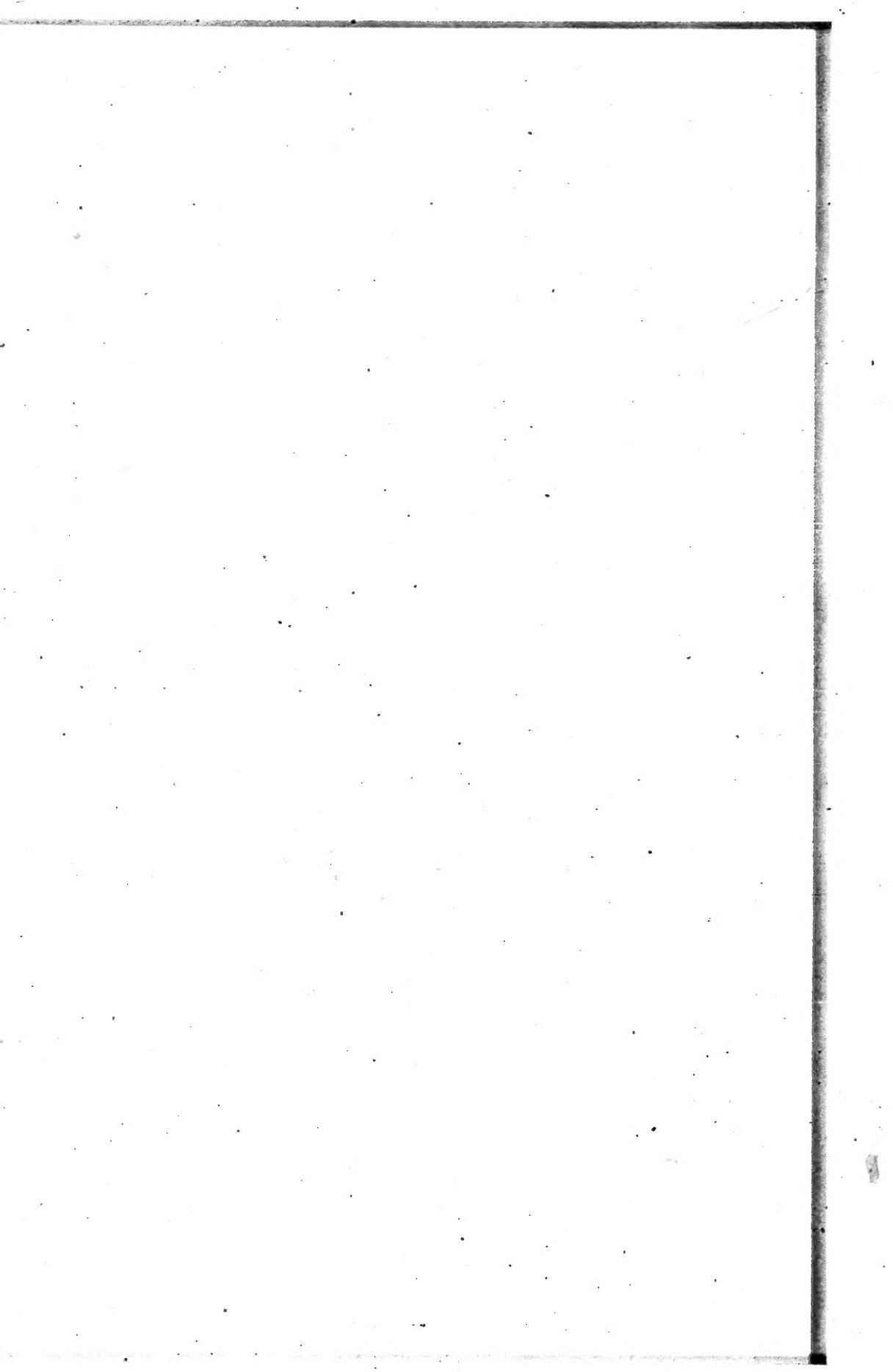
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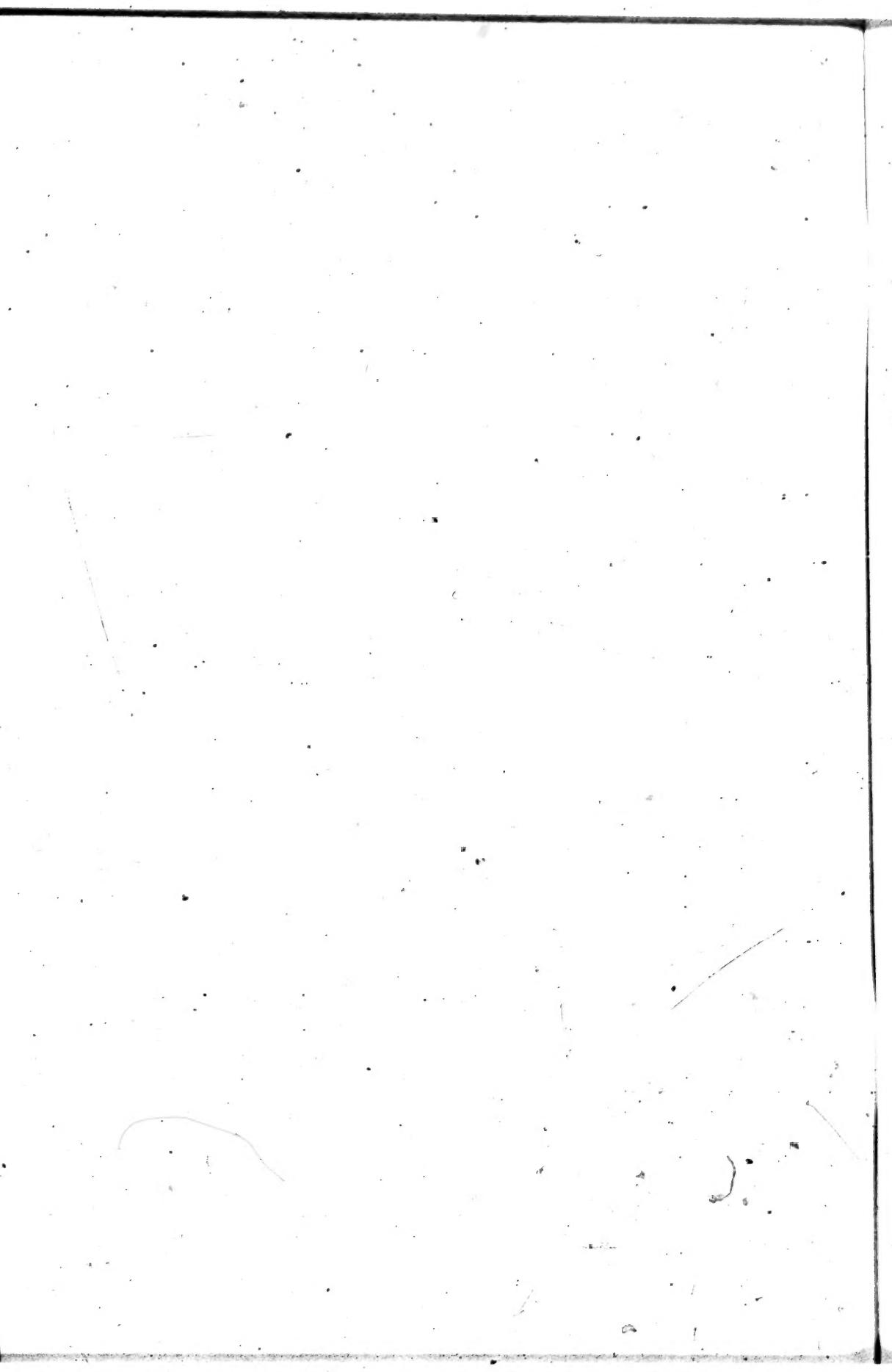
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MARCH 1971.





INDEX

	PAGE
Interest of the <i>Amicus Curiae</i>	1
Argument:	
The State Of Mind Of A Law Enforcement Officer While Questioning A Suspect Is Largely Irrelevant To The Determination Of Whether Miranda Warnings Are Required And The Court Below Erred In Holding That Miranda Warnings Were Required Because The Questions Of I.N.S. Agents Were Directed At Determining A Criminal Investigation	3
Conclusion	16
Appendix:	
An Analysis Of Reported Decisions On The Issue Of "Custody" Under <i>Miranda v. Arizona</i>	17

AUTHORITIES CITED

CASES:

<i>Agius v. United States</i> , 413 F. 2d 915 (5th Cir. 1969)	12
<i>Allen v. United States</i> , 390 F. 2d 476 (D.C. Cir. 1968)	7
<i>Archer v. United States</i> , 393 F. 2d 124 (5th Cir. 1968)	12
<i>Cohen v. United States</i> , 405 F. 2d 34 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969)	4
<i>Commonwealth v. Feldman</i> , 248 A. 2d 1 (Pa. 1968)	10
<i>Commonwealth v. Frye</i> , 252 A. 2d 580 (Pa. 1969) ..	14
<i>Commonwealth v. Jefferson</i> , 226 A. 2d 765 (Pa. Super. 1966)	10
<i>Commonwealth v. Sites</i> , 235 A. 2d 387 (Pa. 1967) ..	10
<i>Coward v. State</i> , 268 A. 2d 508 (Md. App. 1970) ..	14

<i>Dean v. Commonwealth</i> , 166 S.E. 2d 229 (Va. 1969)	10
<i>Dosek v. United States</i> , 405 F. 2d 405 (8th Cir. 1968)	4
<i>Escobedo v. Illinois</i> , 378 U.S. 478 (1964)	5, 12
<i>Freije v. United States</i> , 408 F. 2d 100 (1st Cir. 1969)	9
<i>Hensley v. United States</i> , 406 F. 2d 481 (10th Cir. 1969)	4
<i>Hoffa v. United States</i> , 385 U.S. 293 (1966)	11, 12
<i>Jackson v. State</i> , 259 A. 2d 587 (Md. App. 1969)	14
<i>Johnson v. Commonwealth</i> , 160 S.E. 2d 793 (Va. 1968)	10
<i>Lowe v. United States</i> , 407 F. 2d 1391 (9th Cir. 1969)	6, 9
<i>McMillan v. United States</i> , 399 F. 2d 478 (5th Cir. 1968)	12
<i>Menendez v. United States</i> , 393 F. 2d 312 (5th Cir. 1968)	13
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	1, 2, 5, 6, 8, 12, 13, 14, 15, 16
<i>Myers v. State</i> , 240 A. 2d 288 (Md. App. 1968)	7
<i>Ouletta v. Sarver</i> , 307 F. Supp. 1099 (E.D. Ark. 1970)	4
<i>Ouletta v. State</i> , 442 S.W. 2d 216 (Ark. 1969)	4
<i>People v. Allen</i> , 281 N.Y.S. 2d 602 (N.Y. App. 1967)	8
<i>People v. Arnold</i> , 426 P. 2d 515 (Cal. 1967)	7, 9
<i>People v. Barnes</i> , 252 A. 2d 398 (N.J. 1969)	14
<i>People v. Beasley</i> , 58 Cal. Rptr. 485 (Cal. App. 1967)	14
<i>People v. Bright</i> , 84 Cal. Rptr. 691 (Cal. App. 1970)	9
<i>People v. Brosnan</i> , 299 N.Y.S. 2d 263 (N.Y. App. 1969)	14
<i>People v. Butterfield</i> , 65 Cal. Rptr. 765 (Cal. App. 1968)	7
<i>People v. Fishetti</i> , 264 N.E. 2d 191 (Ill. 1970)	7
<i>People v. Giovianini</i> , 67 Cal. Rptr. 303 (Cal. App. 1968)	7

<i>People v. Hazel</i> , 60 Cal. Rptr. 437 (Cal. App. 1967)	7
<i>People v. Hill</i> , 452 P. 2d 329 (Cal. 1969)	14
<i>People v. Kasperek</i> , 77 Cal. Rptr. 904 (Cal. App. 1969)	14
<i>People v. King</i> , 78 Cal. Rptr. 146 (Cal. App. 1969)	7
<i>People v. Merchant</i> , 67 Cal. Rptr. 459 (Cal. App. 1968)	12
<i>People v. Morse</i> , 452 P. 2d 607 (Cal. 1969)	9
<i>People v. Oramus</i> , 250 N.E. 2d 723 (N.Y. 1969)	14
<i>People v. Orf</i> , 472 P. 2d 123 (Colo. 1970)	10
<i>People v. Rodney</i> , P., 233 N.E. 2d 255 (N.Y. 1967)	7, 9, 11
<i>People v. Wright</i> , 78 Cal. Rptr. 75 (Cal. App. 1969)	9
<i>People v. Yukl</i> , 256 N.E. 2d 172 (N.Y. 1969)	9
<i>Roney v. State</i> , 171 N.W. 2d 400 (Wis. 1969)	14
<i>Spiney v. United States</i> , 385 F. 2d 908 (1st Cir. 1967) cert. denied, 390 U.S. 921 (1968)	3
<i>State v. Anderson</i> , 428 P. 2d 672 (Ariz. 1967)	10
<i>State v. Bradford</i> , 434 S.W. 2d 497 (Mo. 1968)	14
<i>State v. Church</i> , 169 N.W. 2d 889 (Iowa 1969)	14
<i>State v. District Court</i> , 432 P. 2d 93 (Mont. 1967)	12
<i>State v. Farmer</i> , 476 P. 2d 129 (Wash. App. 1970)	14
<i>State v. Hall</i> , 468 P. 2d 598 (Ariz. App. 1970)	7
<i>State v. Hunt</i> , 447 P. 2d 896 (Ariz. App. 1968)	14
<i>State v. Jiminez</i> , 451 P. 2d 583 (Utah 1969)	14
<i>State v. Kinn</i> , 178 N.W. 2d 888 (Minn. 1970)	10
<i>State v. McKnight</i> , 243 A. 2d 240 (N.J. 1968)	15
<i>State v. Sandoval</i> , 452 P. 2d 360 (Idaho 1969)	7
<i>State v. Sherron</i> , 463 P. 2d 533 (Ariz. 1970)	7
<i>State v. Taylor</i> , 437 P. 2d 853 (Ore. 1968)	7
<i>State v. Tellez</i> , 431 P. 2d 691 (Ariz. App. 1967)	12
<i>State v. Thomas</i> , 266 A. 2d 614 (N.J. Super. 1970)	10
<i>State v. Thomas</i> , 454 P. 2d 153 (Ariz. 1969)	10
<i>State v. Webb</i> , 469 P. 2d 153 (N.Y. App. 1970)	14

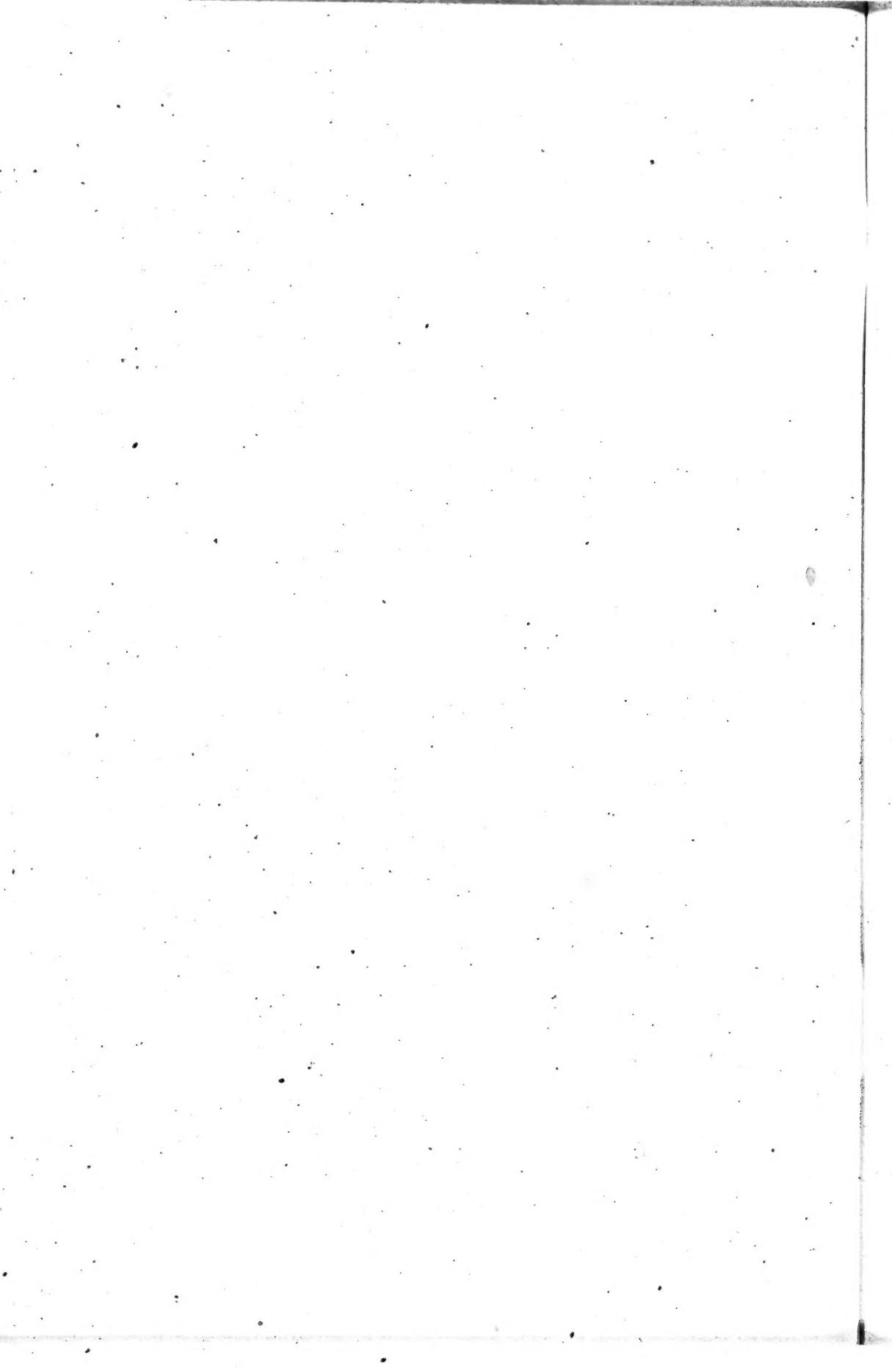
<i>United States v. Bagdasian</i> , 398 F. 2d 971 (4th Cir. 1968)	4
<i>United States v. Browney</i> , 421 F. 2d 48 (4th Cir. 1970)	4
<i>United States v. Caiello</i> , 420 F. 2d 471 (2nd Cir. 1969)	4
<i>United States v. Campos-Serrano</i> , 430 F. 2d 173 (7th Cir. 1970)	4
<i>United States v. Charpentier</i> , — F. 2d — (10th Cir. 1971)	7
<i>United States v. Chikata</i> , 427 F. 2d 385 (9th Cir. 1970)	4
<i>United States v. Cortez</i> , 425 F. 2d 452 (6th Cir. 1970)	9, 12
<i>United States v. Davis</i> , 259 F. Supp. 496 (Mass. 1966)	7
<i>United States v. De LaCruz</i> , 420 F. 2d 1093 (7th Cir. 1970)	12
<i>United States v. Delamarra</i> , 275 F. Supp. 1 (D.C. Cir. 1967)	14
<i>United States v. Dickerson</i> , 413 F. 2d 1111 (7th Cir. 1969)	3
<i>United States v. Fish</i> , 432 F. 2d 107 (4th Cir. 1970)	14
<i>United States v. Gibson</i> , 392 F. 2d 373 (4th Cir. 1968)	13
<i>United States v. Hall</i> , 421 F. 2d 540 (2nd Cir. 1969)	7, 12, 13
<i>United States v. Heffner</i> , 420 F. 2d 809 (4th Cir. 1969)	4
<i>United States v. Jaskiewicz</i> , 433 F. 2d 415 (3rd Cir. 1970)	4, 8
<i>United States v. Leahey</i> , 434 F. 2d 7 (1st Cir. 1970)	4
<i>United States v. Marius</i> , 378 F. 2d 716 (6th Cir. 1967), cert. denied, 389 U.S. 905 (1967)	4

v.

<i>United States v. Montas</i> , 421 F. 2d 215 (5th Cir. 1970)	12
<i>United States v. Prudden</i> , 424 F. 2d 1021 (5th Cir. 1970)	4
<i>United States v. Simon</i> , 421 F. 2d 667 (9th Cir. 1970)	4
<i>United States v. Squeri</i> , 398 F. 2d 785 (2nd Cir. 1968)	7
<i>United States v. Tchack</i> , 296 F. Supp. 500 (S.D. N.Y. 1969)	14
<i>United States v. Welsh</i> , 417 F. 2d 361 (5th Cir. 1969)	14
<i>United States v. White</i> , 417 F. 2d 89 (2nd Cir. 1969), cert. denied, 397 U.S. 912 (1970)	4
<i>William v. United States</i> , 381 F. 2d 20 (9th Cir. 1968)	7
<i>Windsor v. United States</i> , 389 F. 2d 530 (5th Cir. 1968)	10

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Kamisar, "Custodial Interrogation Within the Meaning of <i>Miranda</i> ," <i>Criminal Law And The Constitution—Sources and Commentaries</i> 335 (1968)	6
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1028

UNITED STATES OF AMERICA,

Petitioner,

vs.

DIMAS CAMPOS-SERRANO,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**BRIEF OF THE STATE OF ILLINOIS
AS AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

Responsible prosecutors in every state are vitally concerned with the scope and meaning of the concept of custody in determining the applicability of *Miranda v. Arizona*, 384 U.S. 436 (1966) to specific cases. More particularly, prosecutors are concerned with the relevance of "focus" and its effect on the determination of custody.

Finally, the State of Illinois has a specific interest in this case since the admission into evidence at state trials of defendants' confessions and admissions is subject, ultimately, to review by the Court of Appeals for the Seventh Circuit.

Accordingly, the State of Illinois, with the sponsorship of its Attorney General, offers this brief in support of the petitioner's argument that the court below unduly extended *Miranda v. Arizona*, 384 U.S. 436 (1966).¹

1. The State of Illinois has no specific interest in the resolution of the second issue presented herein, i.e. the status of alien registration cards as "required records".

ARGUMENT

THE STATE OF MIND OF A LAW ENFORCEMENT OFFICER WHILE QUESTIONING A SUSPECT IS LARGELY IRRELEVANT TO THE DETERMINATION OF WHETHER MIRANDA WARNINGS ARE REQUIRED AND THE COURT BELOW ERRED IN HOLDING THAT MIRANDA WARNINGS WERE REQUIRED BECAUSE THE QUESTIONS OF I.N.S. AGENTS WERE DIRECTED AT DETERMINING A CRIMINAL INVESTIGATION.

In *United States v. Dickerson*, 413 F. 2d 1111 (7th Cir. 1969) the court below relied heavily on the state of mind of revenue agents in determining whether they must give *Miranda* warnings to taxpayers whom they question. In particular, the Court of Appeals said that warnings are required at "the first contact with the taxpayer after the case has been transferred to the Intelligence Division". (413 F. 2d at 1117.) In simpler terms, the court held that as soon as the agent knows the case is criminal in nature and intends to elicit information that incriminates, *Miranda* warnings must be given. Presumably, this result would follow even if the suspect were to be questioned in his own home during daylight hours in the presence of friends and family by a single, unarmed and courteous agent. Surely, this concept of custody cannot reasonably be applied to such a situation.²

2. The Dickerson rule is based, in part, on the special problems arising with agencies whose investigative powers are primarily exercised in civil matters but may also be used to secure evidence for criminal prosecutions. Even so, the Dickerson rule represents a distinct minority viewpoint. See: *Spinney v. United States*, 385 F. 2d 908 (1st

In the present case, the court used a similar sort of rationale. The court relied heavily on the fact that "the inquiry itself [was] directed at determining a criminal violation such as in this case where the agents are looking for forged 'cards'" *United States v. Campos-Serrano*, 430 F. 2d 173, 176 (7th Cir. 1970).³

Cir. 1967) cert. denied, 390 U.S. 921 (1968); *United States v. White*, 417 F. 2d 89 (2d Cir. 1969), cert. denied, 397 U.S. 912 (1970); *United States v. Bagdasian*, 398 F. 2d 971 (4th Cir. 1968); *United States v. Marius*, 378 F. 2d 716 (6th Cir. 1967), cert. denied, 389 U.S. 905 (1967); *Cohen v. United States*, 405 F. 2d 34 (8th Cir. 1968) cert. denied, 394 U.S. 943 (1969); *United States v. Chikata*, 427 F. 2d 385 (9th Cir. 1970); *Hensley v. United States*, 406 F. 2d 481 (10th Cir. 1969). See also *Dosek v. United States*, 405 F. 2d 405 (8th Cir. 1968) (S.E.C. Investigator); *Oulette v. State*, 442 S.W. 2d 216 (Ark. 1969) (Federal bank examiner need not give warnings when he suspected the defendant of forgery and invited him to an interview at the bank) approved in *Oulette v. Sarver*, 307 F. Supp. 1099 (E.D. Ark. 1970). The Seventh Circuit's Dickerson rule has been specifically rejected in *United States v. Caiello*, 420 F. 2d 471 (2d Cir. 1969); *United States v. Jaskiewicz*, 433 F. 2d 415 (3rd Cir. 1970); *United States v. Browney*, 421 F. 2d 48 (4th Cir. 1970); *United States v. Prudden*, 424 F. 2d 1021 (5th Cir. 1970); *United States v. Simon*, 421 F. 2d 667 (9th Cir. 1970). Compare *United States v. Prudden*, 424 F. 2d 349 (5th Cir. 1970) with *United States v. Heffner*, 420 F. 2d 809 (4th Cir. 1969) and *United States v. Leahey*, 434 F. 2d 7 (1st Cir. 1970) regarding the enforcement of administrative regulations requiring warnings by means of the exclusionary rule.

3. This factor was not the only one considered by the court but the remaining facts of the case do not, it seems to us, support any arguable contention that the defendant was in "custody" for purposes of *Miranda*. In this case, agents of the Immigration and Naturalization Service arrested Manuel Rico in Chicago on November 19, 1968 during

What the court below does is to import into *Miranda* issues the concept of "focus" used in *Escobedo v. Illinois*, 378 U.S. 478 (1964). The court below has done this virtually unconscious of the substantial dispute concerning the continuing viability of the "focus" concept.

It seems to us that this Court eliminated the concept of focus when it decided *Miranda*. See *Miranda v. Arizona*, 384 U.S. at 44, n. 4. The existence of "focus" was really unnecessary to the result in *Escobedo* since the petitioner there was clearly in custody of police at their station. In all four of the cases giving rise to the *Miranda* rule the suspect was in undisputed custody.⁴ The

an investigation of aliens improperly in this country. The agents accompanied Rico to his apartment to collect his personal belongings. At the apartment, the respondent herein, Campos-Serrano, opened the door. The agents told respondent that Rico was under arrest but could gather his belongings. One of the agents then asked Campos-Serrano where he was from. Respondent answered that he was from Mexico and the agent then demanded some identification. Respondent produced an alien registration receipt card and a social security card. The agents examined the alien registration card, returned it to Campos-Serrano, and left. Outside the apartment, the agents arrested a second man whose alien registration card had been altered. They returned to the same apartment where the three men lived to allow the third man to collect his belongings. Inside the apartment, the agents asked to see Campos-Serrano's alien registration card a second time. Upon examination of the card, the agents determined it had been altered and arrested respondent.

4. *Miranda v. Arizona* (No. 759) (In Phoenix police station after arrest) *Vignera v. New York* (No. 760) (In detective squad headquarters after being picked up) *Westover v. United States* (No. 761) (In Kansas City police station after arrest) *California v. Stewart* (No. 584) (In a cell at a police station after arrest).

Court characterized the common features of the cases in these words: "In each, the defendant was questioned . . . in a room in which he was cut off from the outside world. . . . They all thus share salient features—incommunicado interrogation of individuals in a police dominated atmosphere. . . ." 384 U.S. at 445. The Court applied its holding to "custodial" interrogation or "an interrogation occurring after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444.

There is no language in these cases about "focus" though in all of the cases there was "focus". Nor is there language concerning the intent of the interrogators. The Court simply abandoned the confusing and subjective concept of focus for the clearer and more meaningful concept of custody. In short, the Court made a fresh start in interrogation cases, creating a new clear set of rights and a new clear criterion for judging their applicability.⁵

In the leading case of *Lowe v. United States*, 407 F. 2d 1391 (9th Cir. 1969) it was held that the "Court's decision in *Miranda* clearly abandoned 'focus of investigation' as a test to determine when rights attach in confession cases." In essence, the *Lowe* Court held that it does not matter what the officer knew about the defendant's guilt or what the officer intended to do with defendant so long as the officer did nothing to make the defendant believe he was in custody.

In line with this reasoning the majority of courts have generally held that (1) the fact an officer knows the sus-

5. See Kamisar, "Custodial Interrogation Within the Meaning of *Miranda*," *Criminal Law and The Constitution—Sources and Commentaries*, 335, 338-51, 362 (1968).

pect committed the crime or (2) intends to arrest the suspect at the end of the interview or (3) would not allow the suspect to leave if he tried, does not require that *Miranda* warnings be given if the interview is not otherwise custodial. *United States v. Hall*, 421 F. 2d 540 (2nd Cir. 1969); *United States v. Charpentier*, — F. 2d — (10th Cir. 1971); *State v. Hall*, 468 P. 2d 598 (Ariz. App. 1970); *People v. Arnold*, 426 P. 2d 515 (Cal. 1967); *People v. Hazel*, 60 Cal. Rptr. 437 (Cal. App. 1967); *People v. Butterfield*, 65 Cal. Rptr. 765 (Cal. App. 1968); *People v. Giovianini*, 67 Cal. Rptr. 303 (Cal. App. 1968); *People v. King*, 78 Cal. Rptr. 146 (Cal. App. 1969); *People v. Fischetti*, 264 N.E. 2d 191 (Ill. 1970); *People v. Rodney P.*, 233 N.E. 2d 255 (N.Y. 1967); *State v. Sandoval*, 452 P. 2d 360 (Idaho 1969); *Myers v. State*, 240 A. 2d 288 (Md. App. 1968). In essence, the courts have regarded the intent or knowledge of the officer as irrelevant so long as it is unvoiced, i.e., not stated to the suspect. *Allen v. United States*, 390 F. 2d 476 (D.C. Cir. 1968); *William v. United States*, 381 F. 2d 29 (9th Cir. 1968); *United States v. Davis*, 259 F. Supp. 496 (Mass. 1966) (defendant unaware of arrest warrant in possession of interrogator); *State v. Sherren*, 463 P. 2d 533 (Ariz. 1970); *State v. Taylor*, 437 P. 2d 853 (Ore. 1968).

The basic theory underlying this view has been stated many times. For example, in *United States v. Squeri*, 398 F. 2d 785, 790 (2nd Cir. 1968), the court said:

"The Fifth Amendment privilege prohibits the government from compelling a person to incriminate himself. It was the compulsive aspect of custodial interrogation and not the strength or content of the government's suspicion at the time the questioning was conducted, which led the court to impose the "Miranda" requirements with regard to custodial questioning.

We believe that the presence or absence of compelling pressures, rather than the state to which the government's investigation has developed, determines whether the *Miranda* requirements apply to any particular case."

And in *United States v. Jaskiewich*, 433 F. 2d 415, 419 (3rd Cir. 1970) the court weighed the issue of whether

"The affirmative duties imposed by *Miranda* arise by virtue of the defendant's being a potential target of an indictment, or arise by virtue of the fact that a government agency has in some meaningful way subjected him to physical, or perhaps psychological, restraint. We are persuaded that those duties arise not because the defendant has become the focus of a potential indictment but because the government has in some meaningful way imposed restraint on his freedom of action."

The most striking example of this interpretation of *Miranda* is *People v. Allen*, 281 N.Y.S. 2d 602 (N.Y. App. 1967). There an officer with probable cause to arrest and an intention to arrest went to the suspect's home and questioned him in the presence of his family without telling him he was under arrest. After the conversation the suspect was arrested. The court held that warnings were not required. A footnote in *Miranda*, detailing, with apparent approval, the Scot's practice of interrogating suspects in their homes (384 U.S. at 478 n. 46) led the court to believe this procedure does not require the giving of warnings.

The courts which adhere generally to the view that the focus concept is to be discarded have formulated an "objective" test of custody, i.e., whether under the circumstances of the case, a reasonable man would believe himself to be in custody. The key phrase is a "reason-

able" belief on the part of the "reasonable" suspect. The mere subjective assertion of a suspect, that he considered himself under arrest is not enough. *Freije v. United States*, 408 F. 2d 100 (1st Cir. 1969); *Lowe v. United States*, 407 F. 2d 1391 (9th Cir. 1969); *People v. Morse*, 452 P. 2d 607 (Cal. 1969). Cf. *United States v. Cortez*, 425 F. 2d 452 (6th Cir. 1970). Extraordinary frailties and sensitivities of the individual are not relevant. *People v. Rodney P.*, 233 N.E. 2d 255 (N.Y. 1967). As was said in the recent case of *People v. Yukl*, 256 N.E. 2d 172, 174 (N.Y. 1969) the issue is "Not what the defendant thought but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position."

Under the objective test the court in *People v. Arnold*, 426 P. 2d 515 (Cal. 1967) refused to accept the simple assertion of a suspect who said she thought she had no alternative but to appear for questioning. The court asked the trial court to consider:

"the precise language used by the deputy district attorney in summoning Mrs. Arnold to his office, . . . any statements of the deputy not transcribed, made before or after formal interrogation and . . . the physical surroundings . . . the extent to which the authorities confronted defendant with evidence of her guilt, the pressures exerted to detain defendant and any other circumstances which might have led defendant reasonably to believe that she could not leave freely." (426 P. 2d at 522)

At the other end of the spectrum are those courts which use focus as a definitive test. These courts reason that custody arises at the latest when the officer has probable cause to arrest. See *People v. Wright*, 78 Cal. Rptr. 75 (Cal. App. 1969); *People v. Bright*, 84 Cal.

Rptr. 691 (Cal. App. 1969). See also *Windsor v. United States*, 389 F. 2d 539 (5th Cir. 1968); *State v. Anderson*, 428 P. 2d 672 (Ariz. 1967); *State v. Thomas*, 454 P. 2d 153 (Ariz. 1969); *People v. Orf*, 472 P. 2d 123 (Colo. 1970); *State v. Kinn*, 178 N.W. 2d 888 (Minn. 1970); *State v. Thomas*, 266 A. 2d 614 (N.J. Super 1970); *Commonwealth v. Sites*, 235 A. 2d 387 (Pa. 1967); *Commonwealth v. Feldman*, 248 A. 2d 1 (Pa. 1968); *Johnson v. Commonwealth*, 160 S.E. 2d 793 (Va. 1968); *Dean v. Commonwealth*, 166 S.E. 2d 229 (Va. 1969).

The questionable results flowing from the use of a strict focus test to determine the time when "custody" exists are shown in *Windsor v. United States*, 389 F. 2d 530 (5th Cir. 1968) and *Commonwealth v. Jefferson*, 423 Pa. Super. 541, 226 A. 2d 765 (1966). In *Windsor*, two F. B. I. agents questioned defendant in his hotel room. The defendant was told that he was not under arrest, was not being detained in any way and did not have to answer any questions. The court found his inculpatory oral statement inadmissible because the agents had probable cause to arrest defendant prior to the questioning.

In *Jefferson*, the defendant was eventually convicted of murder growing out of a stabbing which took place on public streets. A police officer on patrol proceeded to a nearby hospital to investigate. Upon entering the accident ward he found several persons including the defendant. In answer to his general inquiries defendant made an inculpatory statement. Another police officer arrived several minutes later and was briefed by the first officer. The second officer asked the group of people, "who did the stabbing?" Defendant said "I did." No warnings were given to defendant prior to either of the statements. The court held that custody "attached" after the ques-

tioning of the first officer but before the questioning of the second officer. The explanation given was that the second officer, due to being briefed by the first officer, had probable cause to arrest the defendant. In commenting on this decision, the New York Court of Appeals stated, "The reasoning overlooks the language and purpose of the Miranda warnings which is to protect the individual's freedom of choice—to answer or not answer—in situations which are inherently coercive. In so doing the Pennsylvania Court reached the rather anomalous result of rejecting an admission made under the same circumstances and conditions as the admissions it accepted merely because as a result of the first questioning, the police would not have permitted her to leave, had she attempted to do so." *People v. Rodney P.*, 236 N.E. 2d 255, 259 (N.Y. 1967).

The courts that rely solely or heavily on focus seem to make two serious errors. The first is ignoring the clear implication in *Hoffa v. United States*, 385 U.S. 293 (1966) that whether the police have probable cause to arrest has no relevance to when the right of a suspect to receive warnings attaches. In *Hoffa*, an informer in Hoffa's group recorded several conversations in which the informer participated and which constituted evidence of jury tampering. In answer to the contention that when the informer and the Government had probable cause to arrest Hoffa, they should have done so instead of continuing to participate in additional conversations, the Court said;

"Law enforcement officers are under no Constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence may fall short of the amount necessary to support a criminal conviction." 385 U.S. at 309-10.

The second error is that the "focus" courts have not only failed to read *Hoffa* and *Miranda* carefully—they have failed to read *Escobedo* carefully. The test in *Escobedo* was not merely "focus", it was "focus" and custody and interrogation. The Court in *Escobedo* defined the situation in which its holding became operative in this language:

"Where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, (and) the police carry out a process of interrogations that lends itself to eliciting incriminating statements." (*Escobedo v. Illinois*, 378 U.S. 478, 490-91).

Several courts consider focus not as a determinative factor but as a significant one. The degree of significance attached to focus varies from case to case. See *Agius v. United States*, 413 F. 2d 915 (5th Cir. 1969) (existence of focus requires close scrutiny); *Archer v. United States*, 393 F. 2d 124 (5th Cir. 1968); *McMillan v. United States*, 399 F. 2d 478 (5th Cir. 1968); *United States v. Montas*, 421 F. 2d 215 (5th Cir. 1970); *United States v. De LaCruz*, 420 F. 2d 1093 (7th Cir. 1970); *United States v. Cortez*, 425 F. 2d 453 (6th Cir. 1970); *State v. Tellez*, 431 P. 2d 691 (Ariz. App. 1967); *People v. Merchant*, 67 Cal. Rptr. 459 (Cal. App. 1968); *State v. District Court*, 432 P. 2d 93 (Mont. 1967).

The Second Circuit Court of Appeals took this position in a case where three agents interviewed a suspect in his home. *United States v. Hall*, 421 F. 2d 540 (2nd Cir. 1969). The court first held that the fact the agents would have stopped the suspect if he fled was immaterial. The court then referred to the footnote in *Miranda* concerning interrogation at the home:

"We do think it (the footnote at 384 U.S. 478 n. 46) suggests that in absence of actual arrest something must be said or done by the authorities either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so. This is not to say that the amount of information possessed by the police and the consequent acuity of their 'focus' is irrelevant. The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*." (421 F. 2d at 545).

The court in *Hall* seems to view "focus" as having a dual role. First, it is a factor for aiding judgment as to the relative credibility of questioner and suspect as they each contend for a finding favorable to their position. Second, if the law enforcement officers have 'focused' on a particular suspect, the court should pay close attention to the possibility that this subjective focusing might lead to the placement of objective pressures on the defendant. "The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*, and vice versa." *United States v. Hall, supra* at 545. This limited view of the role "focus" plays in determining whether custody exists has some validity.

However, experience has shown that it is the lack of focus that is most often the operative fact in reported decisions. Several courts have reasoned, in effect, that since the police had no reason to take anyone into custody—the person interviewed was not, in fact, in custody. See *United States v. Gibson*, 392 F. 2d 373 (4th Cir. 1968); *Menendez v. United States*, 393 F. 2d 312 (5th Cir. 1968);

United States v. Welsh, 417 F. 2d 361 (5th Cir. 1969); *United States v. Delamarra*, 275 F. Supp. 1 (D.C. Cir. 1967); *United States v. Tchack*, 296 F. Supp. 500 (S.D. N.Y. 1969); *State v. Hunt*, 447 P. 2d 896 (Ariz. App. 1968); *People v. Hill*, 452 P. 2d 329 (Cal. 1969); *People v. Beasley*, 58 Cal. Rptr. 485 (Cal. App. 1967); *People v. Kasperek*, 77 Cal. Rptr. 904 (Cal. App. 1969); *State v. Church*, 169 N.W. 2d 889 (Iowa, 1969); *Jackson v. State*, 259 A. 2d 587 (Md. App. 1969); *State v. Bradford*, 434 S.W. 2d 497 (Mo. 1968); *State v. Webb*, 469 P. 2d 153 (Cal. App. 1970); *People v. Oramus*, 250 N.E. 2d 723 (N.Y. 1969) (by implication); *People v. Brosnan*, 299 N.Y.S. 2d 263 (N.Y. App. 1969); *Commonwealth v. Frye*, 252 A. 2d 580 (Pa. 1969); *State v. Jiminez*, 451 P. 2d 583 (Utah, 1969); *Roney v. State*, 171 N.W. 2d 400 (Wis. 1969). See especially *People v. Barnes*, 252 A. 2d 398 (N.J. 1969); *Coward v. State*, 268 A. 2d 508 (Md. App. 1970); *State v. Farmer*, 476 P. 2d 129 (Wash. App. 1970); *United States v. Fish*, 432 F. 2d 107 (4th Cir. 1970).

It is the position of the *amicus curiae* that focus is significant only when it is absent. The lack of focus can serve to assure a court that a particular interrogation is general investigative questioning and thus outside the scope of *Miranda*. However, in nearly every case, the custody question can be decided after a careful examination of the objective circumstances of such interrogation without considering the subjective mental state of the questioner or the suspect. The resolution of custody questions almost exclusively upon objective circumstances, i.e., where and when interrogation took place, who was present and what was said and done, is the best, most accurate and fairest approach. In our view, the best rule for determining custody is whether a reasonable man, inno-

cent of any crime, would reasonably believe he was in custody were he in the defendant's position.⁶ The application of this rule does not require inquiry into the private thoughts of the questioner, as long as these thoughts remain private and are not communicated to the suspect. In its reliance upon the I.N.S. agent's "direction" in asking for the alien registration card, the court below departed from the better rule. Its decision ought to be reversed and this Court should make clear what

6. This rule allows for what may be termed a deliberate non-custodial interrogation. This is a clearly non-custodial interview conducted with an individual who is known or suspected of having committed a crime. The purpose of the interview is to secure damaging evidence. As long as the objective circumstances of such an interview are manifestly non-custodial the requirements of Miranda should not apply.

In this connection it is worthwhile to consider the words of Chief Justice Weintraub of New Jersey dealing with a Miranda problem:

"There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. . . . As to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed or more gifted criminal would not have left. . . . It is consonant with good morals and the Constitution to exploit a criminal's ignorance or stupidity in the detectional process." *State v. McKnight*, 52 N.J. 35, 52-53, 243 A. 2d 240 (1968).

was implicit in *Miranda*, that the existence of focus is not the proper test for determining when *Miranda* is to be applied.

CONCLUSION

For the foregoing reasons, the State of Illinois as *amicus curiae* requests that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

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APPENDIX**AN ANALYSIS OF REPORTED DECISIONS
ON THE ISSUE OF "CUSTODY" UNDER
MIRANDA V. ARIZONA***

*This analysis is a slightly revised version of one portion of "Confessions and Interrogations After Miranda", a monograph published by the National District Attorneys Association. The original monograph dealt with all of the issues arising under Miranda and is exhaustive with respect to all decisions reported prior to August 1, 1970. The portion reprinted here appeared under the heading "Issues in Miranda: Is it Custodial?" The author of the monograph, who has signed this brief as well, has revised the materials to include decisions reported prior to March 1, 1971. Citations do not include denials of certiorari.

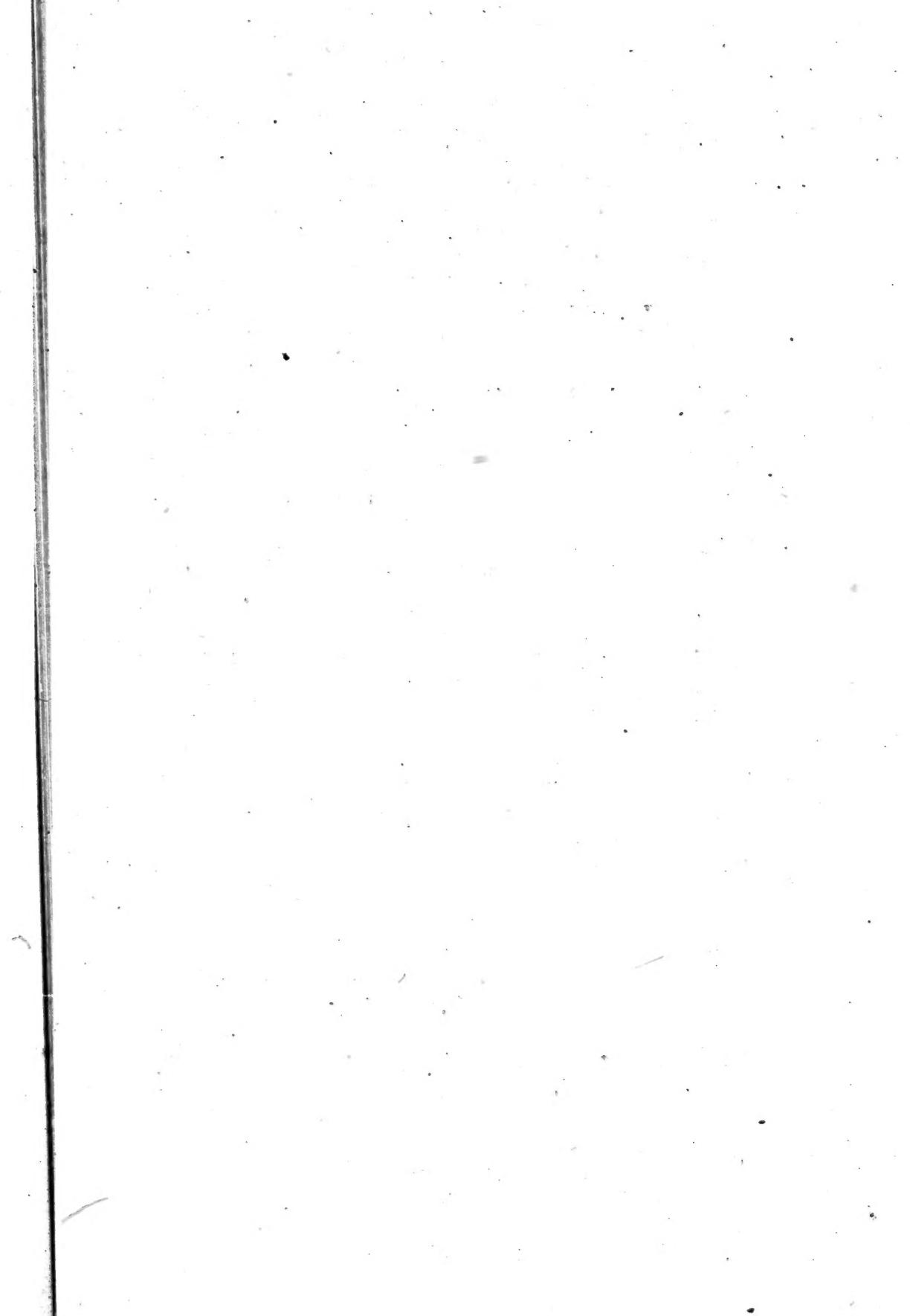


TABLE OF CONTENTS

I. The Place of Interrogation	21
A. Police Stations and Police vehicles	21
B. Jails	24
C. Prosecution Offices	25
D. Homes	26
E. Place of Business	29
F. Stores and Places of Public Accomodations	30
G. Government Offices	31
H. Hospitals	32
I. Automobiles	33
J. Crime Scenes	34
K. Street encounters	39
II. The Time of Day the Interrogation Occurs..	41
III. The Persons Present at the Interrogation	41
IV. The Indicia of Formal Arrest	43
A. Physical Restraint	43
B. Other Restraint	44
C. The Use of Weapons	45
D. Searches and Booking Procedures	45
E. Statements and Demeanor of Officers	46
V. The Length and Form of Questions	49
VI. The Summoning of Police and Initiation of Interviews	52

VII. The Lack of Arrest After the Interview	54
VIII. Statements Constituting the Crime	55
IX. Statements Constituting the Res Gestae	56
X. Statements to Undercover Agents or Informers	57
XI. Statements After Traffic Stops	58
XII. Statements During the Course of Stop and Frisk	59
A. General Stop and Frisk	59
B. Questions Asked in the Interest of Self- protection	62

The Effect of Particular Circumstances Upon The Determination of "Custody"

I. THE PLACE OF INTERROGATION

The experience of the Courts subsequent to *Miranda* has shown that the place of interrogation is a vital factor in determining custody. It is not, however, a conclusive factor.

In the sections that follow the analysis is based largely on the location of the interrogation. It must not be forgotten, however, that the actual physical circumstances and familiarity of the room where the interrogation takes place is also significant. See *United States v. Hall*, 421 F. 2d 540 (2nd Cir. 1969); *United States v. Lackey*, 413 F. 2d 655 (7th Cir. 1969) (small room); *United States v. Gower*, 271 F. Supp. 655 (M.D. Pa. 1967); *People v. Bryant*, 231 N.E. 2d 4 (Ill. App. 1967) (closed room); *Gaudio v. State*, 230 A. 2d 700 (Md. App. 1967); *State v. Seefeldt*, 242 A. 2d 322 (N.J. 1968), (law library in prosecutor's office); *State v. Douglas*, 235 So. 2d 563 (La. 1970); *Shedrick v. State*, 271 A. 2d 773 (Md. App. 1970) (small room); *Underwood v. State*, — S.W. 2d — (Tenn. App. 1970) (closed room).

A. Police Stations and Police Vehicles—In all four cases decided under *Miranda* the suspect was questioned in a police station after arrest. Nevertheless, it is clear that interrogation inside what one Court has called "buildings housing law enforcement personnel" (*Evans v. United States*, 377 F. 2d 535 (5th Cir. 1967) is not necessarily custodial. There have been numerous cases in which the presence of a suspect at a police station was clearly non-custodial.

In *Hicks v. United States*, 382 F. 2d 158 (D.C. Cir. 1967) it was held that statements given in response to interrogation at police headquarters were not custodial when defendant voluntarily went to headquarters upon request. Accord: *United States v. Knight*, 261 F. Supp. 843 (E.D. Pa. 1966) (Uniformed Air Force investigator asked defendant to come to his office to answer questions about mail theft for which defendant was suspected.); *United States v. Appell*, 259 F. Supp. 156 (D. Mass. 1966). (Postal inspector caught defendant in the act and asked him to come to his office.)

Under proper circumstances Courts have accepted the proposition that someone can legitimately be said to have been invited to a police station; *United States v. Tobin*, 429 F. 2d 1261 (8th Cir. 1970) (told he was free to leave); *Thompson v. United States*, 382 F. 2d 390 (9th Cir. 1967); *United States v. Cortez*, 425 F. 2d 453 (6th Cir. 1970); *United States v. Bird*, 293 F. Supp. 1265 (Mont. 1968); *People v. Richards*, 256 N.E. 2d 475 (Ill. App. 1970); *McFadden v. State*, 231 A. 2d 910 (Md. App. 1967); *Commonwealth v. Fisher*, 238 N.E. 2d 525 (Mass. 1968) (invitation by phone); disapproved in *Fisher v. Seafati*, 314 F. Supp. 929 (D. Miss. 1970) (reliance on purpose of officers to elicit admissions); *Jones v. State*, 442 S.W. 2d 698 (Texas 1969); *State v. Bower*, 440 P. 2d 167 (Wash. 1968); *State v. Miller*, 151 N.W. 2d 157 (Wis. 1967); See *United States v. Freije*, 408 F. 2d 100 (1st Cir. 1969) (Officer told defendant he would meet with him wherever defendant preferred); Contra: *Commonwealth v. Banks*, 239 A. 2d 416 (Pa. 1968); *Commonwealth v. Brown*, 247 A. 2d 802 (Penn. App. 1968); *State v. Dillon*, 471 P. 2d 553 (Idaho 1970).

In addition to these kinds of cases the Courts have held police station interrogation to be non-custodial when

the person questioned is present as a witness. *Clark v. United States*, 400 F. 2d 83 (9th Cir. 1968) (two drivers in an accident, both brought into station for report); *State v. Williams*, 235 A. 2d 684 (N.J. App. 1967) aff'd. 255 A. 2d 817 (N.J. 1968) (several persons brought in for routine inquiry: statement also volunteered); *People v. Yukl*, 256 N.E. 2d 172 (N.Y. 1969) (family and friends of deceased); *State v. Cole*, 448 P. 2d 523 (Ore. 1968) (witness in protective custody); *People v. Pugliese*, 260 N.E. 2d 499 (N.Y. 1970) (complaining witness).

There are also cases in which the defendant walks into the station essentially on his own initiative. In *People v. Hill*, 452 P. 2d 329 (Cal. 1969) the defendant called the police station and volunteered some information concerning a crime, he then offered to and did come to the police station and gave a statement; the questioning was held to be non-custodial. See also *People v. Petersen*, 59 Cal. Rptr. 694 (Cal. App. 1967) (a defendant walked into station to inquire about release of his car); *Tolley v. Page*, 436 P. 2d 242 (Okla. 1968).

Of course, there are numerous cases holding that under the circumstances the presence of a suspect at the police station must be considered custodial. *United States v. Pierce*, 397 F. 2d 128 (4th Cir. 1968) (defendant told over phone he would have to come to the station); *United States v. Harrison*, 265 F. Supp. 660 (S.D.N.Y. 1967); *People v. Fioritto*, 441 P. 2d 625 (Cal. 1968); *People v. White*, 446 P. 2d 993 (Cal. 1968) (defendant was invited but was the subject of investigation and of accusatory inquiries); *People v. Allison*, 57 Cal. Rptr. 635 (Cal. App. 1967) (custody because of focus); *People v. Ellingsen*, 65 Cal. Rptr. 744 (Cal. App. 1968); *People v. Connor*, 75 Cal. Rptr. 405 (Cal. App. 1969) (Arrest after defendant

walked in); *People v. Bryant*, 231 N.E. 2d 4 (Ill. App. 1967) (focus on defendant plus questioning in a closed room); *State v. Phinis*, 403 P. 2d 251 (Kan. 1967); *Mulligan v. State*, 271 A. 2d 385 (Md. App. 1970) (defendant questioned in a police car on the way to the police station); *Commonwealth v. Bennett*, 264 A. 2d 706 (Pa. 1970) (defendant picked up by police car and taken to station for polygraph); Cf. *Pemberton v. Peyton*, 288 F. Supp. 920 (E.D. Va. 1968) (defendant driven 65 miles for polygraph test, then interrogated without giving test).

Questioning in police vehicles is also common and where the presence of the person interrogated is clearly a result of invitation the questioning has been non-custodial. *State v. Caha*, 165 N.W. 2d 362 (Neb. 1969); *State v. Travis*, 441 P. 2d 597 (Ore. 1968). Such questioning has also been frequently characterized as essentially custodial under rather particular fact situations. *State v. Saunders*, 435 P. 2d 39 (Ariz. 1969); *Myers v. State*, 240 A. 2d 288 (Md. App. 1968); *Duckett v. State*, 240 A. 2d 332 (Md. App. 1968).

B. Jails—In *Mathis v. United States*, 391 U.S. 1 (1968) the Court, by a vote of 5-3, reversed the Fifth Circuit and held that one who was incarcerated in a penitentiary for one offense was in custody for purposes of interrogation conducted by I.R.S. agents with respect to another offense.

The holding in *Mathis* was reached by many courts prior to the Supreme Court decision and has been rigorously followed. *United States v. Redfield*, 402 F. 2d 454 (4th Cir. 1968); *United States v. Kucinich*, 404 F. 2d 262 (6th Cir. 1968); *Seagroves v. State*, 211 So. 2d 486 (Ala. 1968); *People v. McFall*, 66 Cal. Rptr. 277 (Cal. App. 1968); *People v. Woodberry*, 71 Cal. Rptr. 167 (Cal. App.

1968); *Young v. State*, 234 So. 2d 341 (Fla. 1970); *Hunt v. State*, 234 A. 2d 785 (Md. App. 1967); *People v. Mallory*, 240 N.E. 2d 37 (N.Y. 1968); *State v. McDaniel*, 158 S.E. 2d 874 (N.C. 1968); *Commonwealth v. Simala*, 252 A. 2d 575 (Pa. 1969).

Indeed the general rule is that if the suspect is in jail he is in custody for purposes of any interrogation. See *People v. Varnum*, 427 P. 2d 772 (Cal. 1967); *People v. Bolinski*, 67 Cal. Rptr. 347 (Cal. App. 1968); *Commonwealth v. Eperjesi*, 224 A. 2d 216 (Pa. 1966); *Dean v. Commonwealth*, 166 S.E. 2d 288 (Va. 1969).

If there is exception to the general rule, it arises in cases when the Court finds there was no "interrogation" of a prisoner. See *People v. Morse*, 452 P. 2d 607 (Cal. 1969) and cases collected under Point V.*

C. Prosecution Offices—In *Commonwealth v. O'Toole*, 223 N.E. 2d 87 (Mass. 1967) aff'd. on habeas corpus sub nom *O'Toole v. Seafati*, 386 F. 2d 168 (1st Cir. 1968) the defendant was the City Manager of Revere, Massachusetts. He was the principal suspect in a rather large series of misappropriations of city funds. Defendant was aware of this fact. He was asked to come to the Office of the District Attorney. The Assistant District Attorney asked for an explanation of certain records and disbursements. The defendant's explanations were used against him at his trial. The Court held that the failure of the prosecutor to warn O'Toole of his rights was irrelevant. O'Toole was not in custody in the prosecutor's office nor was he brought there under arrest. Under these circumstances the interrogation was held to be non-custodial under *Miranda*.

* Point V in the original monograph deals with the nature and application of the concept of "interrogation."

The courts have regarded interrogations in prosecutor's offices with a fair degree of willingness to find them non-custodial, *State v. Seefeldt*, 242 A. 2d 322 (N.J. 1968); *Commonwealth v. Feldman*, 248 A. 2d 1 (Pa. 1968). See also *United States v. Jackson*, 390 F. 2d 317 (2nd Cir. 1968) (Defense counsel present) *People v. Arnold*, 426 P. 2d 515 (Cal. 1967).

D. Homes—Ordinarily interrogation in a suspect's home is not custodial but this principle is not absolute. In *Orozco v. Texas*, 394 U.S. 324 (1969) a suspect was questioned at 4 a.m. in his bedroom by four officers, one of whom testified that the suspect was under arrest. The Court held that the suspect was the subject of custodial interrogation even though the questioning was brief and took place in his own bedroom. The key factors apparently were the time of the interrogation (at 4 a.m. and after the officers were told defendant was asleep), the number of officers and the evidence of formal arrest (though this is unclear.)

Most cases of interrogation at a home involve less severe circumstances and generally it is held that questioning a suspect in his own home without arrest is not custodial interrogation. *United States v. Agy*, 374 F. 2d 94 (6th Cir. 1967); *United States v. Hicks*, 382 F. 2d 158 (D.C. Cir. 1967). (Police questioned defendant in her apartment.); *United States v. Kubik*, 266 F. Supp. 501 (S.D. Iowa 1967). (Defendant questioned several times at his own home); *United States v. Essex*, 275 F. Supp. 393 (E.D. Tenn. 1967). (Defendant questioned in her home—no warrant or charge pending); *People v. Allen*, 281 N.Y.S. 2d 602 (App. Div. 1967), (Defendant questioned at home in the presence of family by officers who intended to arrest him after the interview was over);

State v. Meunier, 224 A. 2d 922 (Vt. 1966). (Officer came to home of defendant to question him about a possible speeding violation); State v. Noriega, 433 P. 2d 281 (Ariz. App. 1967). (Police went to defendant's home after he was identified as a burglar and interrogated him there with his family present). People v. Roy, 260 N.E. 2d 5 (Ill. App. 1970) (at defendant's home after he agreed to go to the police station—no custody; also volunteered); People v. Rodney, P. 233 N.E. 2d 255 (N.Y. 1967). (Defendant was questioned in his back yard); Schoonmaker v. State, 279 N.Y.S. 2d 481 (Sup. Ct. 1967) (Prime suspect interviewed in her home).

In Commonwealth v. Eperjesi, 224 A. 2d 216 (Pa. 1966) the defendant was suspected of the death of two children who were found in a refrigerator. Two officers came to her home and she volunteered to one of them that she had shut the refrigerator door. The officer then asked her if she knew the children were inside and she said yes. The issue was whether warnings were required before the officers asked any questions. The Court held that such questions were proper investigation. The Court further reasoned that Miranda was meant to protect those swept from familiar surroundings into police custody.

In People v. Miller, 455 P. 2d 377 (Cal. 1969) the questioning of defendant in his front yard was held non-custodial although the officer suspected the defendant to be involved in what turned out to be a homicide.

In Virgin Islands v. Berne, 412 F. 2d 1055 (3rd Cir. 1969) officers questioned a man who they strongly suspected committed rape—he was questioned at his home and surrendered some clothes from the trunk of his car—this was held non-custodial.

Questioning of a person at his friend's or relative's home is also generally ruled non-custodial. See *Steigler v. Superior Court*, 252 A.2d 300 (Del. 1969) (Neighbor's home); *State v. Phinis*, 430 P.2d 251 (Kan. 1967); *Duffy v. State*, 221 A.2d 633 (Md. 1966) (Police came to arrest defendant but before doing so questioned him in his girl-friend's house); *People v. Rogers*, 165 N.W.2d 337 (Mich. App. 1968) (Grandmother's house). *United States v. Fish*, 432 F.2d 107 (4th Cir. 1970).

There have been a few—very few—cases in which custodial interrogation was held to have occurred in the suspect's home. These cases arose from special circumstances or relied upon the existence of focus. See *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968) (hotel room); *Rosario v. Guam*, 391 F.2d 869 (9th Cir. 1968); *Jiminez v. State*, 208 So.2d 124 (Fla. App. 1968) (after return from police station); *People v. Paulin*, 305 N.Y.S.2d 607 aff'd. 255 N.E.2d 607 (N.Y. 1970) ("police dominated" atmosphere); *State v. Peters*, 231 N.E.2d 91 (Ohio App. 1967) (brought to home by police after arrest); *Commonwealth v. Sites*, 235 A.2d 387 (Pa. 1967) (focus plus moving suspect from presence of friends). *United States v. Bekoures*, 432 F.2d 8 (9th Cir. 1970) (close and persistent questioning).

The overwhelming number of cases have found questioning at the suspect's home to be non-custodial. In addition to the cases already cited, see: *United States v. Hall*, 421 F.2d 540 (2nd Cir. 1969); *United States v. Mackiewicz*, 401 F.2d 219 (2nd Cir. 1968); *United States v. Bagdasian*, 398 F.2d 971 (4th Cir. 1968); *Evans v. United States*, 377 F.2d 535 (5th Cir. 1967); *Menendez v. United States*, 393 F.2d 312 (5th Cir. 1968); *McMillan v. United States*, 399 F.2d 478 (5th Cir. 1968); *Thomp-*

son v. United States, 382 F. 2d 390 (9th Cir. 1967); United States v. Littlepage, 435 F. 2d 498 (5th Cir. 1970); United States v. Essex, 275 F. Supp. 393 (E.D. Tenn. 1968) rev'd. on other grounds 407 F. 2d 214; United States v. Manni, 270 F. Supp. 103 (D. Mass. 1967) aff'd. 391 F. 2d 922; State v. Hunt, 447 P. 2d 896 (Ariz. App. 1968); Stout v. State, 426 S.W. 2d 800 (Ark. 1968); People v. Butterfield, 65 Cal. Rptr. 765 (Cal. App. 1968); Jackson v. State, 259 A. 2d 587 (Md. App. 1969); Commonwealth v. Cutler, 249 N.E. 2d 632 (Mass. 1969); People v. Brosnan, 299 N.Y.S. 2d 263 (N.Y. App. 1969); State v. Williams, 168 S.E. 2d 217 (N.C. App. 1969); Commonwealth v. Barclay, 240 A. 2d 839 (Pa. App. 1968); Bendaw v. State, 429 S.W. 2d 506 (Texas 1968); Jones v. State, 442 S.W. 2d 698 (Texas 1969); State v. Bower, 440 P. 2d 167 (Wash. 1968).

E. Places of Business—Interrogation of a suspect in his place of business is usually non-custodial. As in the case of homes, the place of business represents a familiar surrounding. See United States v. Berkowitz, 429 F. 2d 921 (1st Cir. 1970) (defendant questioned in his own store, ostensibly cooperating with police); United States v. Gallagher, 430 F. 2d 1222 (7th Cir. 1970) (suspect's law office); United States v. Fayette, 388 F. 2d 728 (2nd Cir. 1968); United States v. Webb, 398 F. 2d 553 (4th Cir. 1968) (I.C.C. agent who had no power to arrest); Archer v. United States, 393 F. 2d 124 (5th Cir. 1968); White v. United States, 395 F. 2d 170 (8th Cir. 1968); United States v. Dudgeon, 279 F. Supp. 300 (D. Mass. 1967) (F.D.A. inspector who had no power to arrest); United States v. Delamarra, 275 F. Supp. 1 (D.C. 1967); United States v. Roth, 285 F. Supp. 364 (S.D. N.Y. 1968); United States v. Morton Provision Co., 294 F. Supp. 285 (Del.

1968). See also *United States v. Prudden*, 424 F. 2d 1021 (5th Cir. 1970).

Several state courts have reached similar results. See *State v. Hall*, 468 P. 2d 598 (Ariz. App. 1970); *State v. Carpenter*, 435 P. 2d 789 (Idaho 1968); *People v. Robinson*, 177 N.W. 2d 234 (Mich. App. 1970); *State v. Boykin*, 172 N.W. 2d 754 (Minn. 1969); *State v. Lipker*, 241 N.E. 2d 171 (Ohio App. 1968); *Tate v. State*, 413 S.W. 2d 366 (Tenn. 1967); *Brown v. State*, 437 S.W. 2d 828 (Texas 1968); *Robinson v. State*, 441 S.W. 2d 855 (Texas 1969). *State v. McLam*, 478 P. 2d 570 (N.M. App. 1970). In one interesting case the Court pointed out that when a policeman is being questioned—his police station is his place of business. *People v. Williams*, 290 N.Y.S. 2d 321 (Sup. Ct. 1968).

The making of an actual arrest, however, renders the interrogation custodial even if it is in the suspect's place of business. See *People v. Ryff*, 284 N.Y.S. 2d 953 (N.Y. App. 1967).

F. Stores and Places of Public Accommodations—The rationale of familiar surroundings applicable to questioning in homes and offices does not invariably apply when the interrogation occurs in a restaurant or bar. However, the usual view in such cases is that the interrogation is not custodial. This result is due to the fact that the suspect is, if not in a completely familiar place, at least in a place of his own choosing. Another significant factor is the lack of isolation from the outside world and the distinct absence of police station atmosphere. See *United States v. Charpentier*, — F. 2d — (10th Cir. 1971) (Salvation Army Building lobby); *Lucas v. United States*, 408 F. 2d 835 (9th Cir. 1969) (night club); *United States v. Messina*, 388 F. 2d 393 (2nd

Cir. 1968) (park bench and restaurant); Perry v. United States, 230 A. 2d 721 (D.C. 1967) (Hallway of a hotel); Williams v. State, 232 So. 2d 366 (Miss. 1970) (cafe); State v. Zachmeier, 441 P. 2d 737 (Mont. 1968) (tavern).

In People v. Beasley, 58 Cal. Rptr. 485 (Cal. App. 1967) two police officers questioned the suspect in a pawnshop after he pawned goods the officers believed were stolen. The questioning was held non-custodial as was a similar interrogation in People v. Hazel, 60 Cal. Rptr. 437 (Cal. App. 1967). But see People v. Orf, 472 P. 2d 123 (Colo. 1970) (Tavern—opinion relies on existence of focus).

G. Government Offices—The questioning of persons at government offices presents a situation in which the rationale of familiar surroundings is inapplicable (except for the employees at the office). Nevertheless, the Courts have usually construed such questioning as non-custodial. Support for these rulings is found in the fact that the offices in question do not create a "police dominated" atmosphere. Often the personnel asking the questions have no power of arrest and the questions asked are few. Further, the decided cases deal mostly with draft resisters and the Courts probably tend to view the statements of such persons as volunteered in spirit, if not in fact. See United States v. Holmes, 387 F. 2d 781 (7th Cir. 1967); Fults v. United States, 395 F. 2d 852 (10th Cir. 1968); Noland v. United States, 380 F. 2d 1016 (10th Cir. 1967); United States v. Kroll, 402 F. 2d 221 (3rd Cir. 1968). See United States v. Hamlin, 432 F. 2d 905 (5th Cir. 1970) (the defendant appeared uninvited at postal inspector's office to discuss his new brochure, the inspector then discussed inquiries his office had received concerning the brochure, thereafter the defendant met with the postal inspector on several occasions—Miranda was held inapplicable to any of the conversations).

H. Hospitals—Questioning of a suspect who is confined in a hospital as a patient but who is not under arrest is not custodial interrogation. *State v. District Court*, 432 P. 2d 93 (Mont. 1967). (Sheriff questioned prime suspect in murder who was confined as a private patient in a hospital); *People v. Gilbert*, 154 N.W. 2d 800 (Mich. 1967). (Police in hospital questioned a defendant walking around the emergency room who was involved in an auto accident and whose breath smelled of liquor).

In *State v. Zucconi*, 235 A. 2d 193 (N.J. 1967) the defendant was involved in a fatal auto accident and the principal evidence against him were his admissions on two separate occasions to an interrogating State Trooper that he was driving the car. The Court said, "In the present case defendant never was in the custody of the police nor was he deprived of his freedom by authorities. The questioning here took place in defendant's hospital room and at his home, surroundings totally lacking in the compelling atmosphere inherent in the process of in-custody interrogation." 235 A. 2d at 194. See also: *Lamb v. United States*, 414 F. 2d 250 (9th Cir. 1969); *State v. Sandoval*, 452 P. 2d 350 (Idaho 1969) (definite suspect questioned at hospital); *Tillery v. State*, 238 A. 2d 125 (Md. App. 1968) (Person interviewed was thought to be a shooting victim); *State v. Mitchell*, 163 N.W. 2d 310 (Minn. 1968) (Suspect interviewed at hospital about possible homicide after death of wife in house fire); *State v. Rudd*, 230 A. 2d 129 (N.J. 1967); *State v. Lopez*, 442 P. 2d 594 (N.M. 1968); *State v. Webb*, 469 P. 2d 153 (N.M. App. 1970); *People v. Phinney*, 239 N.E. 2d 515 (N.Y. 1968) (single question); *Commonwealth v. Bordner*, 247 A. 2d 612 (Pa. 1968) (routine investigation); *Commonwealth v. Frye*, 252 A. 2d 580 (Pa. 1969) (suspect visited victim at hospital and claimed to be victim's brother); *State v. Kelter*, 426 P. 2d 500 (Wash. 1967).

The cases dealing with hospital interviews have relied on the routine nature of the inquiry and on the lack of objective indicia of custody (See Point IV). The physical condition and drug intake of the suspect are also considered, though logically these factors have nothing to do with Miranda. The existence of pain and drug intake affects voluntariness and waiver—they really have nothing to do with the determination of custody.

Hospital interviews, however, have often been held custodial in nature. The citations are: Howard v. State, 217 So. 2d 548 (Ala. App. 1969); Robinson v. State, 224 So. 2d 675 (Ala. App. 1969); People v. Vaiza, 52 Cal. Rptr. 733 (Cal. App. 1966) (intent to incriminate suspect); People v. Braun, 241 N.E. 2d 25 (Ill. App. 1968) (suspect informed that officers had a ticket for him); Thomas v. State, 238 A. 2d 558 (Md. App. 1968); State v. Evans, 439 S.W. 2d 170 (Mo. 1969); State v. Ross, 157 N.W. 2d 860 (Neb. 1968) (suspect in pain and under sedation); Shedrick v. State, 271 A. 2d 733 (Md. App. 1970) (two officers with suspect in small room when suspect knew of the serious condition of the victim); People v. Tanner, 295 N.Y.S. 2d 709 (N.Y. App. 1968) (relay questioning); Vandegriff v. State, 409 S.W. 2d 370 (Tenn. 1966).

I. Automobiles.

Although most cases in which a suspect is questioned in his automobile are usually resolved on the theory that a traffic stop does not constitute custody (Section I, K.)—there are some cases emphasizing the fact that a suspect in his own car is in familiar surroundings. Under either rationale these cases generally find a lack of custody. See Chavez-Martinez v. ~~United~~ States, 407 F. 2d 535 (9th

Cir. 1969); Williams v. United States, 381 F. 2d 20 (9th Cir. 1967) (defendant stopped his car himself at a border station); United States v. Montos, 421 F. 2d 215 (5th Cir. 1970); United States v. Littlejohn, 260 F. Supp. 278 (S.D.N.Y. 1966); United States v. Montez-Hernandez, 291 F. Supp. 712 (S.D. Cal. 1968); State v. Tellez, 431 P. 2d 691 (Ariz. App. 1967); State v. Thomas, 454 P. 2d 153 (Ariz. 1969); People v. Allison, 57 Cal. Rptr. 635 (Cal. App. 1967); People v. Stewart, 73 Cal. Rptr. 484 (Cal. App. 1968); State v. Rodgers, 207 So. 2d 755 (La. 1968); Jones v. State, 234 A. 2d 900 (Md. App. 1967); Cornish v. State, 251 A. 2d 23 (Md. App. 1969) (the defendant stopped his car on his own volition); People v. Johnson, 271 N.Y.S. 2d 814 (Sup. Ct. 1966); State v. Miller, 151 N.W. 2d 157 (Wis. 1967) (The defendant was driving his car to the police station with a policeman as passenger). Contra: People v. McFall, 66 Cal. Rptr. 277 (Cal. App. 1968); People v. Ceccone, 67 Cal. Rptr. 499 (Cal. App. 1968).

The situation in which a suspect is questioned in his own car is also commonly dealt with under the rubric of on-the-scene questioning (Section I, K).

J. Crime Scenes. In *Miranda* the Court said that its decision was "not intended to hamper the traditional function of police officers in investigating crime.... General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477-78.

The scope of this language has been the subject of many decisions.

Generally speaking, questioning of a suspect prior to arrest near the scene of a crime is not custodial interrogation. *United States v. Davis*, 259 F. Supp. 496 (D. Mass. 1969) (Wyszanski, J.) (Customs officers find narcotics and questioned defendant about them without warnings); *United States v. Small*, 297 F. Supp. 582 (D. Mass. 1969) (Questioning of suspect at a locker where marijuana was stored); *Laury v. State*, 260 A. 2d 907 (Del. 1969) (accosting suspect at robbery scene); *Nevels v. State*, 216 So. 2d 529 (Miss. 1968) (Questions at the end of a chase and search); *People v. Schhwartz*, 292 N.Y.S. 2d 518 (N.Y. App. 1968) (Two questions of person leaving scene of reported assault); *State v. Gray*, 150 S.E. 2d 1 (N.C. 1966) (Suspect voluntarily went to home of victim where larceny occurred); *State v. Shedd*, 161 S.E. 2d 650 (N.C. 1968) (Burglar caught on premises; questioning after arrest); *New v. State*, 259 N.E. 2d 696 (Ind. 1970). See also *State v. Brown*, 176 N.W. 2d 180 (Iowa 1970); *State v. Dubany*, 167 N.W. 2d 556 (Neb. 1969); *State v. Carr*, 154 N.W. 2d 526 (Neb. 1967); *State v. Watts*, 152 S.E. 2d 684 (S.C. 1967); *Sutton v. State*, 419 S.W. 2d 857 (Texas 1967); *State v. Largo*, 473 P. 2d 845 (Utah 1970) (Questioning of sixty boys residing in a dormitory concerning invasion of girl's dormitory and rape of one of the girls) Cf. *State v. Phinis*, 430 P. 2d 251 (Kans. 1967); *Thompson v. State*, 235 So. 2d 354 (Fla. App. 1970).

Several cases have reached the same conclusion with respect to questioning at the scene of an automobile accident. See *State v. Lief*, 234 A. 2d 124 (Conn. Cir. 1967); *State v. Kinn*, 178 N.W. 2d 888 (Minn. 1970); *State*

v. Beck, 268 A. 2d 416 (Conn. App. 1970); People v. Jendrzejak, 240 N.E. 2d 239 (Ill. App. 1968); People v. Routt, 241 N.E. 2d 206 (Ill. App. 1968); People v. Morgan, 180 N.W. 2d 508 (Mich. App. 1970); State v. Kinn, 178 N.W. 2d 888 (Minn. 1970); Ford v. State, 226 So. 2d 378 (Miss. 1969); People v. Alexander, 293 N.Y.S. 2d 138 (Co. Ct. 1968); State v. Hayes, 161 S.E. 2d 185 (N.C. 1968); State v. Taylor, 437 P. 2d 853 (Ore. 1968); State v. Desjardin, 272 A. 2d 599 (N.H. 1970).

The most commonly reported instance of on-the-scene questioning involves homicides.

In State v. Gosser, 236 A. 2d 377 (N.J. 1967) the defendant shot his wife. He then called a friend and in a distraught voice said that something terrible had happened and asked the friend to come over. Instead the friend called the police who went to the house. The defendant opened the door. He was groggy and crying; his pajamas and face were crusted with blood. The officer asked him what the trouble was and defendant answered that he killed his wife. The policeman told defendant to sit on the couch and remain there. The officer called for assistance. A sergeant arrived and again asked defendant what happened. The defendant answered that he shot his wife. The sergeant asked where she was. The defendant replied that she was upstairs. The officers and the defendant went upstairs where defendant volunteered some further information. Then they came downstairs where defendant was arrested. The Court said that these statements were the result of general on-the-scene questioning prior to arrest and were not open to challenge by defendant.

In State v. Oxentine, 154 S.E. 2d 529 (N.C. 1967) the defendant shot the victim in the defendant's home. The

police arrived and asked what happened. The defendant replied that he shot him. The Court held that the defendant was not in custody or deprived of his freedom and that the questioning did not fall within the meaning and intent of Miranda. "We do not interpret this important decision to exclude statements made at the scene of an investigation when nobody has been arrested, detained or charged."

In *Tate v. State*, 413 S.W. 2d 366 (Tenn. 1967) the defendant shot his boss at the office and his defense at trial was self-defense. Officers testified that they arrived on the scene and asked who did the shooting. In the presence of others defendant said that he did. The officers asked why and he said because the boss was firing him from his job. This questioning was held to be within the scope of general investigation.

In *Britton v. State*, 170 N.W. 2d 785 (Wis. 1969) an officer summoned to the scene of a shooting was told that the assailant fled into a gangway. The officer went into the gangway and asked the man he saw there if he was involved. The reply was, "Yeh, I shot him." Miranda was held inapplicable.

Similar holdings are found in: *Truex v. State*, 210 So. 2d 424 (Ala. 1968) ("What happened?"); *Ison v. State*, 200 Sd. 2d 511 (Ala. 1967) ("Did you shoot him?"); *Stout v. State*, 426 S.W. 2d 800 (Ark. 1968) (Officers summoned about a dead body); *People v. Stewart*, 59 Cal. Rptr. 71 (Cal. App. 1967); *People v. Morse*, 452 P. 2d 607 (Cal. 1969) (At jail where one inmate kills another); *Green v. State*, 157 S.E. 2d 257 (Ga. 1967) (At scene of shooting defendant surrenders a revolver and then admits shooting); *People v. Bey*, 259 N.E. 2d 800 (Ill. 1970); *Carrington v. State*, 230 A. 2d 112 (Md. App.

1967); Weissinger v. State, 218 So. 2d 432 (Miss. 1969) ("Where is the gun?"); People v. Williford, 311 N.Y.S. 2d 461 (N.Y. App. 1970); State v. Meadows, 158 S.E. 2d 638 (N.C. 1968); ("What happened?") Commonwealth v. Lopinson, 234 A. 2d 522 (Pa. 1967) rev'd on other grounds 392 U.S. 647; Ballard v. State, 454 S.W. 2d 193 (Tenn. App. 1969); Bell v. State, 442 S.W. 2d 716 (Texas 1969) ("What happened?"); State v. Nuckols, 459 P. 2d 979 (Wash. App. 1969); Cf. State v. Tarrance, 211 So. 2d 304 (La. 1968).

The crime scene situation as well as several others, i.e., street encounters, traffic stops, and stop and frisk usually give rise to the problem of the officer who will testify that if the suspect had tried to leave, the officer would have stopped him. This should not create a custodial situation as long as such an intent to stop is unvoiced. However, it seems to me that even if the officer at the scene of a crime asks one or more persons to remain at the scene—this should not be thought to establish custody. The Court in Miranda referred to deprivation "of freedom of action in any significant way" and declared that its opinion did not apply to "general, on-the-scene interviews and that "it is an act of responsible citizenship" for persons to give information to the police. It can be persuasively argued that the Court envisioned the brief retention of all potential witnesses at the scene of a crime and excluded this kind of interviewing from Miranda. An ordinary innocent person directed by an officer not to leave the scene of a crime would not consider himself in custody or under arrest and there is no reason for a court to do so. See in this connection: Arnold v. United States, 382 F. 2d 4 (9th Cir. 1967); People v. Alexander, 293 N.Y.S. 2d 138 (Co. Ct. 1968). State v. Rogers, 236 So. 2d 715 (La. 1970); People v. Morgan, 180 N.W. 2d 508 (Mich. App. 1970).

K. Street Encounters—"On the Scene"

Another form of general on the scene questioning occurs when an officer makes inquiries of persons on the public ways under suspicious circumstances. See Jennings v. United States, 391 F. 2d 512 (5th Cir. 1968) (While an officer was examining suspect car, defendant came up to car and made damaging admissions in ensuing conversation); United States v. Gibson, 392 F. 2d 373 (4th Cir. 1968) (brief inquiries of suspect on sidewalk); Arnold v. United States, 382 F. 2d 4 (9th Cir. 1968) (Suspect asked to step away from crowd); United States v. Agy, 374 F. 2d 94 (6th Cir. 1967); United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968) (Suspect prowling in railroad yard); United States v. Diaz, 427 F. 2d 636 (1st Cir. 1970) (hitchhiker-request for identity); United States v. Clark, 294 F. Supp. 1108 (E.D. Pa. 1968) (suspect running on street, stopped by officer). Where an officer simply finds someone he is seeking in the street and makes inquiries this too is non-custodial, United States v. Owens, 431 F. 2d 349 (5th Cir. 1970).

State courts have generally reached the same conclusion as the cited federal cases: Lockridge v. Superior Court, 80 Cal. Rptr. 223 (Cal. App. 1969) (Person descending from telephone pole within 100 feet of store where alarm was set off); People v. Sjosten, 68 Cal. Rptr. 832 (Cal. App. 1968); State v. Caha, 165 N.W. 2d 362 (Neb. 1969); People v. Cartwright, 182 N.W. 2d 811 (Mich. App. 1970) (Two persons stopped in the vicinity of a break-in); People v. Fairley, 301 N.Y.S. 2d 1013 (N.Y. App. 1969) (At gasoline station—suspect initiated conversation); People v. McKie, 250 N.E. 2d 36 (N.Y. 1969) (On the street—suspect initiated conversation); People v. Milligen, 245 N.E. 2d 551 (Ill. App. 1969) (person near

burglarized premises); Gaudio v. State, 230 A. 2d 700 (Md. App. 1967) (Defendant after traffic arrest was waiting to post bond and standing near his truck when officers asked him about smuggling cigarettes); Hall v. State, 251 A. 2d 219 (Md. App. 1969); People v. Patten, 166 N.W. 2d 284 (Mich. App. 1968) (Officer asked suspect what he was doing on a certain truck); State v. Bradford, 434 S.W. 2d 497 (Mo. 1968) (Suspects seated in car in parking lot of closed establishment at odd hours); State v. Perry, 237 N.E. 2d 891 (Ohio 1968) (Person stopped while running from a building); State v. Whitney, 431 P. 2d 711 (Wash. 1967) (Suspect walking on highway near car known to be stolen, the officers ask if the car is his); State v. Huson, 440 2d 192 (Wash. 1968). State v. Bosford, 467 P. 2d 352 (Wash. App. 1970). See also People v. Kenney, 279 N.Y.S. 2d 198 (Sup. Ct. 1966); State v. Woodall, 241 N.E. 2d 755 (Ohio C.P. 1968).

The basic premise underlying these decisions is that the officers were confronted with suspicious circumstances which could have been resolved with an explanation from the person questioned. The absence of a custodial atmosphere is significant but the investigative nature of the encounter is foremost.

Of course, under certain circumstances street and scene encounters may be deemed custodial. See Allen v. United States, 404 F. 2d 1335 (D.C. Cir. 1968); People v. Chavira, 61 Cal. Rptr. 407 (Cal. App. 1967); State v. Shaffner, 143 N.W. 2d 458 (Wis. 1966).

II.

**THE TIME OF THE DAY THE
INTERROGATION OCCURS**

An interview conducted in a non-custodial setting during normal business hours is more likely to be found non-custodial than one which is conducted at an odd hour of the night.

The intrusion of police in the early morning hours to make inquiries would support a reasonable man's belief that he might be in custody. See *Orozco v. Texas*, 394 U.S. 324 (1969). Of course, on the scene questioning shortly after the commission of a crime may permissibly take place at odd hours but seeking out someone some distance away from the scene as was done in *Orozco* tends to support a finding that the interrogation was custodial.

III.

**THE PERSONS PRESENT AT THE
INTERROGATION**

The language of *Miranda* evinces concern for a suspect "cut off from the outside world" 384 U.S. at 445. It follows that the presence of friends or neutrals at an interview is a fact of some relevance. See 384 U.S. at 461, 478 n. 46.

Accordingly, several courts have considered the presence of friends as indicative of non-custody. *United States v. Owens*, 431 F. 2d 349 (5th Cir. 1970). (Defendant's friends); *Archer v. United States*, 393 F. 2d 124 (5th

Cir. 1968) (Suspect's husband); United States v. Manni, 270 F. Supp. 103 (D. Mass. 1967); aff'd. 391 F. 2d 922 (1st Cir. 1968) (suspect's wife); State v. Noriega, 433 P. 2d 281 (Ariz. App. 1967) (suspect's family); State v. Tellez, 431 P. 2d 691 (Ariz. App. 1967) (suspect's friends); Stout v. State, 426 S.W. 2d 800 (Ark. 1968) (suspect's wife); People v. Butterfield, 65 Cal. Rptr. 765 (Cal. App. 1968) (suspect's mother); State v. Davis, 157 N.W. 2d 907 (Iowa 1968) (Doctor and nurses); Jones v. State, 234 A. 2d 900 (Md. App. 1967) (Suspect's girl-friend); McFadden v. State, 231 A. 2d 910 (Md. App. 1967) (suspect's wife); People v. Allen, 281 N.Y.S. 2d 602 (N.Y. App. 1967) (suspect's family); State v. Gray, 150 S.E. 2d 1 (N.C. 1966) (suspect's cousin); Commonwealth v. Barelay, 240 A. 2d 839 (Pa. App. 1968) (suspect's family); State v. Largo, 473 P. 2d 895 (Utah 1970) (school counselors).

See generally: United States v. Hall, 421 F. 2d 540 (2nd Cir. 1969); State ex rel Lowe v. Nelson, 202 So. 2d 232 (Fla. App. 1967); Franklin v. State, 151 S.E. 2d 191 (Ga. App. 1966); People v. Rogers, 165 N.W. 2d 337 (Mich. App. 1968); People v. Cerrato, 246 N.E. 2d 501 (N.Y. 1969). But see People v. Bryant, 231 N.E. 2d 4 (Ill. App. 1967); People v. Anon, 294 N.Y.S. 2d 248 (Sup. Ct. 1968).

By the same token the deliberate removal of a suspect from the presence of his family and friends tends to support a finding of custody. Commonwealth v. Sites, 235 A. 2d 387 (Pa. 1967) Cf. Pemberton v. Peyton, 288 F. Supp. 920 (E.D. Va. 1968) (driving a suspect 65 miles to give polygraph and then interrogating him without giving the polygraph).

The "balance of power" may also be significant in cases where the sheer number of police is inferential of

police dominated atmosphere. See Orozeo v. Texas, 394 U.S. 324 (1969); Fisher v. Seafati, 314 F. Supp. 929 (D. Mass. 1970) (Three police officers with suspect in one room); Shadrick v. State, 271 A.2d 773 (Md. App. 1970) (two officers and one suspect in a small room); State v. Ross, 157 N.W.2d 860 (Neb. 1968); People v. Paulin, 305 N.Y.S.2d 605 (Sup. Ct. 1969) aff'd. 308 N.Y.S.2d 883 (N.Y. App. 1969) aff'd. 255 N.E.2d (N.Y. 1969); Underwood v. State, — S.W.2d — (Tenn. App. 1970) (Questioned alone by judge and two probation officers). Presumably the reverse is true and the officer who is significantly outnumbered by suspects or a suspect's friends may be found to have conducted a non-custodial interview. See People v. Robinson, 177 N.W.2d 234 (Mich. App. 1970) (single officer). In People v. Morgan, 180 N.W.2d 508 (Mich. App. 1970) a request by an officer at the scene of an accident addressed to 50 to 75 bystanders asking who was the driver was not custodial interrogation.

The fact that the interviewer is a uniformed policeman does not render the interview *per se* custodial. State v. Hall, 468 P.2d 598 (Ariz. App. 1970). People v. Rodney, P.233 N.E.2d 255 (N.Y. 1967); State v. Meunier, 224 A.2d 922 (Vt. 1966). But the presence of a uniformed officer has been considered as one circumstance supporting a finding of custody. See People v. Bliss, 278 N.Y.S.2d 732 (Sup. Ct. 1967).

IV.

THE INDICIA OF FORMAL ARREST

A. Physical Restraint The Courts have generally recognized the existence of physical restraint is a significant factor in determining questions of custody. The opinion

in *Miranda* recognizes the significance of physical restraint. See 384 U.S. at 461, 477.

The absence of physical restraint has led several courts to the conclusion that the defendant was not under arrest or in custody. *United States v. Fiorillo*, 376 F. 2d 180 (2d Cir. 1967) (telephone conversation with suspect); *People v. Hill*, 452 P. 2d 329 (Cal. 1969) (same); *People v. Ragen*, 68 Cal. Rptr. 700 (Cal. App. 1968) (same); *People v. Merchant*, 67 Cal. Rptr. 459 (Cal. App. 1968) (police asked questions from outside locked screen door). *People v. Cartwright*, 182 N.W. 2d 811 (Mich. App. 1970). See *United States v. Gallagher*, 430 F. 2d 1222 (7th Cir. 1970) ("free to come and go as he pleased"). But the lack of physical restraint does not automatically mean non-custody. *U.S. v. Bekowies*, 432 F. 2d 8 (9th Cir. 1970).

The existence of physical restraint has invariably led to a finding of custody. *United States v. Averell*, 296 F. Supp. 1004 (S.D. N.Y. 1969) (handcuffing); *State v. Saunders*, 435 P. 2d 39 (Ariz. 1967) (Officer placed his hand on suspect's arm and led him to patrol car); *State v. Michael*, 436 P. 2d 595 (Ariz. 1968) (same); *People v. Connor*, 75 Cal. Rptr. 905 (Cal. App. 1969) (handcuffing); *Myers v. State*, 240 A. 2d 288 (Md. App. 1968) (suspect pulled into patrol car); *People v. McKay*, 287 N.Y.S. 2d 795 (N.Y. App. 1968) (officer wrapped arms around suspect, then handcuffed him); *Commonwealth v. Moody*, 239 A. 2d 409 (Penn. 1968) (handcuffing).

B. Other Restraint The courts also recognize that in certain cases restraint may be non-physical in nature but the drawing of lines is not simple. In *People v. Gilbert*, 175 N.W. 2d 547 (Mich. App. 1970) a suspect was asked to come to a police car and there informed of an accusa-

tion of rape. The Court found custody. In *Priestly v. State*, 446 P. 2d 405 (Wyo. 1968) custody was found where the officer told the suspect to get into the police car. Formal arrest, of course, establishes custody even without physical restraint, *United States v. Droz*, 427 F. 2d 636 (1st Cir. 1970).

On the other hand, the mere request of an officer to a suspect to step aside does not create a custodial situation. *United States v. Arnold*, 382 F. 2d 4 (9th Cir. 1967); *People v. Rodney* P. 233 N.E. 2d 255 (N.Y. 1967). Nor does a request to step outside a cafe for routine questions create custody. *United States v. Gibson*, 392 F. 2d 373 (4th Cir. 1968). Contra, *People v. Orf*, 472 P. 2d 123 (Colo. 1970).

C. The Use of Weapons Holding a gun on a suspect creates a clearly custodial situation. *State v. Intogna*, 419 P. 2d 59 (Ariz. 1967); *People v. Shivers*, 233 N.E. 2d 836 (N.Y. 1967). But Cf. *State v. Goudy*, 479 P. 2d 800 (Hawaii 1971).

The fact that a suspect is himself armed should be weighed strongly against a finding of custody. See *Yates v. United States*, 384 F. 2d 586 (5th Cir. 1967); *Ison v. State*, 200 So. 2d 511 (Ala. 1967). This sort of situation is not rare. Armed felons often make damaging admissions when holding off police. See *People v. Tahl*, 423 P. 2d 246 (Cal. 1967). And an officer who arrives at the scene of a shooting may also find that his suspect is armed.

D. Searches and Booking Procedures It has been recognized in the earliest cases that the absence of finger-printing, photographing and other booking procedures are indicative of the non-custodial interview. *Hicks v. United States*, 382 F. 2d 158 (D.C. Cir. 1967). See *People*

v. Robinson, 177 N.W. 2d 234 (Mich. App. 1970). The use of booking procedures leads to the contrary conclusion. See People v. Ellingsen, 65 Cal. Rptr. 744 (Cal. App. 1968) (fingerprinting and removal of clothes); People v. Connor, 75 Cal. Rptr. 69 (Cal. App. 1969) (booking).

Similarly, the absence of frisk or search helps to show absence of custody United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968). The reverse is true. United States v. Averell, 296 F. Supp. 1004 (S.D. N.Y. 1969); Commonwealth v. Moody, 239 A. 2d 409 (Pa. 1968).

A related problem arises when a suspect is interviewed on premises where the officer is executing a search warrant. A single question to a suspect whose apartment was being searched was held permissible in People v. Cerrato, 246 N.E. 2d 501 (N.Y. 1969); People v. Fischetti, 264 N.E. 2d 191 (Ill. 1970) (same). See also: State v. Gumnis, 469 P. 2d 833 (Ariz. App. 1970); State v. Porter, 443 P. 2d 360 (Kan. 1968); People v. Torres, 233 N.E. 2d 282 (N.Y. 1967) (volunteered); Sutton v. State, 419 S.W. 2d 857 (Texas 1967) (defendant arrived at house during search and was asked where he lives); Brown v. State, 437 S.W. 2d 828 (Texas 1968); State v. Boykin, 172 N.W. 2d 754 (Minn. 1969) (officers serving warrant asked if defendant was the owner); Amos v. State, 234 So. 2d 630 (Miss. 1970); Contra: People v. Wilson, 74 Cal. Rptr. 131 (Cal. App. 1968). See United States v. Bekowies, 432 F. 2d 8 (9th Cir. 1970). Where the search is illegal the statements may be suppressed as fruits of the poisoned tree. People v. Hendricks, 250 N.E. 2d 323 (N.Y. 1969).

E. Statements and Demeanor of Officers The officer who tells a suspect that he is not under arrest and is free to leave at any time has fairly definitely established that the interview is non-custodial. See United States v.

Tobin, 429 F. 2d 1261 (8th Cir. 1970); Lucas v. United States, 408 F. 2d 835 (9th Cir. 1969); United States v. Maglona, 414 F. 2d 642 (9th Cir. 1969); Doran v. United States, 421 F. 2d 865 (9th Cir. 1970); Archer v. United States, 393 F. 2d 124 (5th Cir. 1968); United States v. Cortez, 425 2d 453 (6th Cir. 1970); United States v. Davis, 295 F. Supp. 496 (D. Mass. 1966); State v. Sher-
ron, 463 P. 2d 533 (Ariz. 1970); Wingard v. State, 208 So. 2d 263 (Fla. App. 1968); Beason v. State, 453 P. 2d 283 (Okla. 1969); Robinson v. State, 441 S.W. 2d 855 (Texas 1969). The only exception to this rule has occurred in a jurisdiction which, at the time of the decision, used a pure focus concept to determine custody. See Windsor v. United States, 389 F. 2d 530 (5th Cir. 1968).

If a suspect is told he is under arrest then, of course, there is custody for Miranda purposes. In all such cases a reasonable man would reasonably conclude that he is in custody. It is clear that custody exists in all cases after formal arrest. People v. Hale, 69 Cal. Rptr. 28 (Cal. App. 1968); Duckett v. State, 240 A. 2d 332 (Md. App. 1968); Franklin v. State, 252 A. 2d 487 (Md. App. 1969). See Johnson v. Commonwealth, 160 S.E. 2d 793 (Va. 1968) (suspect told not to leave home after interview).

One special situation occurs when a suspect is in custody on other charges—under rule in Mathis he is in custody even if the officer tells him he could leave the interview room if he chooses. See Young v. State, 234 So. 2d 341 (Fla. 1970).

There are a scattering of cases relying on what the officer did not say concerning arrest. In State v. Caha, 165 N.W. 2d 362 (Neb. 1969) the Court relied partially on the fact that the suspect had never been told he was under arrest to negate custody. See also United States v.

Littlepage, 435 F. 2d 498 (5th Cir. 1970); People v. Cartwright, 182 N.W. 2d 811 (Mich. App. 1970). In People v. Ellingsen, 65 Cal. Rptr. 744 (Cal. App. 1968) the fact that a defendant was never told he was free to go was one circumstance leading to a finding of custody. See United States v. Lackey, 413 F. 2d 655 (7th Cir. 1969).

The fact that warnings are given does not mean that the suspect was in custody, United States v. Owens, 431 F. 2d 349 (5th Cir. 1970).

Finally, the demeanor of the officer may be significant. The higher the level of courtesy and deference the suspect—the more likely a court is to find that the suspect did not reasonably believe he was in custody. See State v. Bode, 261 A. 2d 396 (N.J. App. 1970) (Police chief questioning subordinate with the aim of protecting his fellow officer); Commonwealth v. Willman, 255 A. 2d 534 (Pa. 1969) (Friendly attitude of officers) The giving of unnecessary warnings has been thought to demonstrate an attitude of courteous consideration and thus support a finding of no custody, State v. McLam, 478 P. 2d 570 (N.M. App. 1970). Where, however, the officer is very accusatory and insistently confronts the suspect with evidence of his guilt, the argument that custody existed is strengthened. See People v. Arnold, 426 P. 2d 515 (Cal. 1967); Cf. United States v. Lackey, 413 F. 2d 655 (7th Cir. 1969) (Defendant was required to take an oath and the interview was tape recorded in small room.)

V.

THE LENGTH AND FORM OF QUESTIONS

The length and nature of the interrogation is of considerable significance. Almost all of the cases approving crime scene and street interrogations conducted without warnings rely upon the additional fact that questioning was brief—consuming little time and involving a few, very general inquiries.

The reliance of courts on brevity of interrogation occurs in two kinds of cases. First, there are situations in which the brief questioning aids a court in determining that there was no custody. These situations are dealt with here. Second, there are situations where the suspect is clearly in custody, i.e., in jail under arrest, and the court concludes that one or two questions do not, under the circumstances, constitute "interrogation." These situations are dealt with in Point V.*

The cases on point rely both on the brevity and the nature of inquiries. Brief, routine police inquiries are indicative of a non-custodial interview designed to clarify a questionable situation. The leading case is probably *Allen v. United States*, 390 F. 2d 476 (D.C. Cir. 1968) modified 404 F. 2d 1335 where an officer stopped a car driven by defendant. There was a passenger in the car who was bleeding and injured. The driver gave some suspicious answers to the officer's questions and the officer asked the passenger if he had been beaten or by whom he had been beaten. The passenger mumbled in-

*Point V of the original monograph deals with the nature and application of the concept of "interrogation."

coherently and pointed at the driver. The officer asked the driver if he had done it and the driver said yes. The Court held that the officer had to clarify the situation and that he did so properly by asking routine questions. The Court found that such questioning was permissible under Miranda and pointed out that warnings demean routine police investigation and make cooperative citizens nervous.

The Courts have generally reached the same result where short, neutral (non-accusatory) inquiries were put, i.e., Who are you? Where do you live? What are you doing here? Where do you come from? Is this car (or other item) yours? Where did you get it? etc. *Sciberras v. United States*, 380 F. 2d 732 (10th Cir. 1967); *Arnold v. United States*, 382 F. 2d 4 (9th Cir. 1967); *United States v. Gibson*, 392 F. 2d 373 (4th Cir. 1968); *United States v. Thomas*, 396 F. 2d 310 (2nd Cir. 1968); *Chavez-Martinez v. United States*, 407 F. 2d 535 (9th Cir. 1969); *Lowe v. United States*, 407 F. 2d 1491 (9th Cir. 1969); *Virgin Islands v. Berne*, 412 F. 2d 1055 (3rd Cir. 1969); *United States v. Montes*, 421 F. 2d 215 (5th Cir. 1970); *United States v. Charpentier*, — F. 2d — (10th Cir. 1971); *Sharbor v. Gathright*, 295 F. Supp. 386 (W.D. Va. 1969) (name); *United States v. Diaz*, 427 F. 2d 636 (1st Cir. 1970).

The relevant state cases are *Truex v. State*, 210 So. 2d 424 (Ala. 1968); *State v. Reynolds*, 436 P. 2d 142 (Ariz. App. 1968); *Stout v. State*, 426 S.W. 2d 800 (Ark. 1968); *People v. Quicke*, 455 P. 2d 787 (Cal. 1969); *People v. Terry*, 466 P. 2d 961 (Cal. 1970); *People v. Alesi*, 434 P. 2d 360 (Cal. 1967); *People v. Allison*, 57 Cal. Rptr. 635 (Cal. App. 1968); *People v. Wright*, 66 Cal. Rptr. 995 (Cal. App. 1968); *People v. Hazel*, 60 Cal. Rptr. 437 (Cal.

App. 1967); *People v. Bolinski*, 67 Cal. Rptr. 347 (Cal. App. 1968); *People v. Manis*, 74 Cal. Rptr. 423 (Cal. App. 1969); *Lockridge v. Superior Court*, 80 Cal. Rptr. 223 (Cal. App. 1969); *People v. Henera*, 90 Cal. Rptr. 802 (Cal. App. 1970); *White v. United States*, 222 A. 2d 843 (D.C. 1966); *People v. Routt*, 241 N.E. 2d 206 (Ill. App. 1968); *Duffy v. State*, 221 A. 2d 653 (Md. 1966); *People v. Robinson*, 177 N.W. 2d 234 (Mich. App. 1970); *State v. Brandford*, 434 S.W. 2d 497 (Mo. 1968); *Schnepp v. State*, 437 P. 2d 84 (Nev. 1968); *People v. Rodney P.*, 233 N.E. 2d 255 (N.Y. 1967); *People v. Phinney*, 239 N.E. 2d 515 (N.Y. 1968); *People v. Cerrato*, 246 N.E. 2d 501 (N.Y. 1969); *State v. Meadows*, 158 S.E. 2d 638 (N.C. 1968); *State v. Lipker*, 241 N.E. 2d 171 (Ohio App. 1968); *Commonwealth v. Bordner*, 247 A. 2d 612 (Pa. 1968); *State v. Watts*, 152 S.E. 2d 684 (S.C. 1967); *Sutton v. State*, 419 S.W. 2d 857 (Texas 1967); *State v. Whitney*, 431 P. 2d 711 (Wash. 1967); *State v. Bosford*, 467 P. 2d 352 (Wash. App. 1967); *State v. Lister*, 469 P. 2d 597 (Wash. App. 1970).

The existence of lengthy interrogations indicates custody. See *People v. Ryff*, 284 N.Y.S. 2d 953 (N.Y. App. 1967); *State v. Skiffer*, 218 So. 2d 313 (La. 1969). The use of relay questioning is highly damaging to a contention of no custody. *People v. Tanner*, 295 N.Y.S. 2d 709 (N.Y. App. 1968); *People v. Ellingsen*, 65 Cal. Rptr. (Cal. App. 1968). Repeated interviews lead to similar inferences. *Commonwealth v. Banks*, 239 A. 2d 416 (Pa. 1968). In *United States v. Bekowies*, 432 F. 2d 8 (9th Cir. 1970) the Court relied heavily upon the presence of close and persistent questioning to establish custody.

The use of accusatory and leading questions is not helpful to the argument that no custody existed. *State v.*

Evans, 439 S.W. 2d 170 (Mo. 1969). Confronting the suspect with evidence against him People v. Arnold, 426 P. 2d 515 (Cal. 1967); Underwood v. State, — S.W. 2d — (Tenn. App. 1970) and discounting the suspect's denials are also indicative of custody. People v. White, 446 P. 2d 993 (Cal. 1968); Commonwealth v. Sites, 235 A. 2d 387 (Pa. 1967).

The logic behind the latter cases is that confrontation and accusation by the police in many situations would give rise to a reasonable belief in an innocent man that the police think he had committed a crime and that his arrest is either imminent or is an accomplished fact.

Finally, those courts that use the concept of focus may approve routine interrogation on the additional grounds that the routine nature of the inquiry tends to show lack of focus.

V I.

THE SUMMONING OF POLICE AND INITIATION OF INTERVIEWS

The fact that a suspect summons the police and/or initiates the interview supports the premise that the interview was non-custodial. The rationale is similar to that underlying the admission of volunteered statements—the element of compulsion is lacking and the statements are not solely the result of police action. It may also be thought that where the suspect initiates contact with the police, the police are likely not to assume, at least in the beginning, that he is a guilty party.

In People v. Lee, 308 N.Y.S. 2d 412 (N.Y. App. 1970) the defendant flagged down a police car and stated that he shot a would be robber (who was the true victim).

The Court held that the defendant was not in custody when the police questioned him about the incident. In *State v. Huson*, 440 P. 2d 192 (Wash. 1968) the defendant arranged for an officer to pick him up at an agreed place—the conversation at the agreed place was held not custodial. See also *Davidson v. United States*, 371 F. 2d 994 (10th Cir. 1966); *Stout v. State*, 426 S.W. 2d 800 (Ark. 1968); *Beeks v. State*, 167 S.E. 2d 156 (Ga. 1969); *People v. Routt*, 241 N.E. 2d 206 (Ill. App. 1968); *Spell v. State*, 253 A. 2d 919 (Md. App. 1969); *Commonwealth v. Cutler*, 249 N.E. 2d 632 (Mass. 1969); *People v. Bey*, 259 N.E. 2d 800 (Ill. 1970); See *Schmidt v. State*, 265 N.E. 2d 219 (Ind. 1970); *Lipps v. State*, 258 N.E. 2d 322 (Ind. 1970); *State v. Zachmeier*, 441 P. 2d 737 (Mont. 1968); *People v. Yukl*, 256 N.E. 2d 172 (N.Y. 1969); *People v. Fairley*, 301 N.Y.S. 2d 1013 (N.Y. App. 1969). See *State v. Meeks*, 469 P. 2d 302 (Kan. 1970).

One who volunteers to go down to a police station to give evidence as a witness is not in custody. *People v. Hill*, 452 P. 2d 329 (Cal. 1969); *United States v. Posey*, 416 F. 2d 545 (5th Cir. 1969). Similarly, a defendant who, for his own purposes of using the agent as an intermediary, sought out a man known to be a state agent is not in custody. *Adjmi v. State*, 208 So. 2d 859 (Fla. App. 1968).

On the other hand, police insistence on interviewing a suspect at 4 A.M. when they had been told he was asleep was inferential of custody. See *Orozeo v. Texas*, 394 U.S. 324 (1969).

VII.

THE LACK OF ARREST AFTER THE INTERVIEW

The fact that a suspect was arrested immediately following an interview does not mean the interview was necessarily custodial. In nearly every case dealing with non-custodial interviews the suspect was, in fact, promptly arrested afterwards. One court has considered the subsequent arrest to relate back but only because the charge was in the nature of a pretext. *United States v. Bekowies*, 432 F. 2d 8 (9th Cir. 1970).

However, the case where a suspect is allowed to go free after the interview is almost certainly one in which the interrogation is non-custodial. See *Evans v. United States*, 377 F. 2d 535 (5th Cir. 1967); *Nobles v. United States*, 391 F. 2d 602 (5th Cir. 1968); *United States v. Manglona*, 414 F. 2d 642 (9th Cir. 1969); *United States v. Scully*, 415 F. 2d 680 (2nd Cir. 1969); *Virgin Islands v. Berne*, 412 F. 2d 1055 (3rd Cir. 1969); *United States v. Littlepage*, 435 F. 2d 498 (5th Cir. 1970); *United States v. Clark*, 294 F. Supp. 1108 (E.D. Pa. 1968); *Sharbor v. Gathright*, 295 F. Supp. 386 (W.D. Va. 1969); *United States v. Kubik*, 266 F. Supp. 501 (S.D. Iowa 1967); *United States v. Knight*, 261 F. Supp. 843 (E.D. Pa. 1966).

See also: *State v. Hunt*, 447 P. 2d 896 (Ariz. App. 1968); *State v. Hall*, 468 P. 2d 598 (Ariz. App. 1970); *People v. Singleton*, 63 Cal. Rptr. 423 (Cal. App. 1967); *People v. Butterfield*, 65 Cal. Rptr. 765 (Cal. App. 1968); *Thompson v. State*, 235 So. 2d 354 (Fla. App. 1970); *Commonwealth v. O'Toole*, 233 N.E. 2d 887 (Mass. 1967) approved in *O'Toole v. Seafati*, 386 F. 2d 168 (1st Cir. 1968); *People v. Rogers*, 165 N.W. 2d 337 (Mich. App.

1968); *State v. Seefeldt*, 242 A. 2d 322 (N.J. 1968); *People v. Williams*, 290 N.Y.S. 2d 321 (Sup. Ct. 1968); *State v. Williams*, 168 S.E. 2d 217 (N.C. App. 1969); *State v. Travis*, 441 P. 2d 597 (Ore. 1968); *Jones v. State*, 442 S.W. 2d 698 (Texas 1969); *State v. Lister*, 469 P. 2d 597 (Wash. App. 1970). *Contra*: *Underwood v. State*, — S.W. 2d —, (Tenn. App. 1970).

VIII.

STATEMENTS CONSTITUTING THE CRIME

Where a suspect in custody attempts to bribe an officer—his statement constitutes a crime in itself and is probably admissible even though he may make the bribe offer during a period of custodial interrogation without having received warnings. See *Vinyard v. United States*, 335 F. 2d 176 (8th Cir. 1964); *United States v. Perdiz*, 256 F. Supp. 805 (S.D. N.Y. 1966) (illegal arrest precedes bribe offer); *State v. McKinley*, 234 N.E. 2d 611 (Ohio App. 1967); *People v. Ricketson*, 264 N.E. 2d 220 (Ill. App. 1970) ("you take the stuff and we will go"); Cf. *Commonwealth v. French*, 259 N.E. 2d 195 (Mass. 1970). The same result follows where a statement made without necessary warnings constitutes perjury. *United States v. Di Giovanni*, 397 F. 2d 409 (7th Cir. 1968); *State v. Van Nostrand*, 465 P. 2d 909 (Ore. App. 1970); Cf. *People v. Genser*, 58 Cal. Rptr. 290 (Cal. App. 1967); *People v. Goldman*, 234 N.E. 194 (N.Y. 1967). See also; *Noland v. United States*, 380 F. 2d 1016 (10th Cir. 1967) (Statements made by inductee at induction center); *United States v. Kroll*, 402 F. 2d 221 (3rd Cir. 1968) (same).

The reasoning of the above cases is supported by two recent decisions which hold that one can be prosecuted

for filing false information even though the statute which required the filing was unconstitutional. See *Dennis v. United States*, 384 U.S. 855 (1966); *Bryson v. United States*, 396 U.S. 64 (1969).

IX.

STATEMENTS CONSTITUTING THE RES GESTAE

Two states have adopted the theory that any statement admissible as part of the res gestae would be admissible without Miranda warnings. *Hill v. State*, 420 S.W. 2d 408 (Texas 1967) (question asked just after arrest); *Fisk v. State*, 432 S.W. 2d 912 (Texas 1968) (defendant in shock spoke despite attempts of officers to silence and warn); *Spann v. State*, 448 S.W. 2d 128 (Texas 1969); *Brown v. State*, 437 S.W. 2d 828 (Texas 1969); *Moore v. State*, 440 S.W. 2d 643 (Texas 1969); *Wright v. State*, 440 S.W. 2d 646 (Texas 1969) (private citizen); *Lucas v. State*, 452 S.W. 2d 468 (Texas 1970) (victim came upon suspect who had been stopped for traffic violation while in victim's car). *Jones v. State*, 458 S.W. 2d 654 (Texas 1970) (inquiring about pills found in glove compartment).

In *People v. O'Neill*, 162 N.W. 2d 490 (Mich. App. 1968) it was held that statements made in resistance to arrest are admissible as part of the res gestae without Miranda warnings. The same result was reached in *People v. Bean*, 151 N.W. 2d 878 (Mich. App. 1967) where a suspect was seen running on the street, stopped and asked why.

The res gestae theory seems superfluous. If the concept of res gestae is reasonably narrow in terms of remoteness of time and place it is safe to assume that

Miranda is not applicable. This is not because the statements are part of the *res gestae*, it is because the statements will be either non-custodial or volunteered or made to some private citizen.

X.

STATEMENTS TO UNDERCOVER AGENTS OR INFORMERS

If a suspect does not know he is speaking to a policeman he can hardly be said to have a reasonable belief that he is in custody. Nevertheless, it has been argued that undercover police should give warnings when the investigation focuses on the particular suspect. The argument clearly conflicts with *Hoffa v. United States*, 385 U.S. 293 (1966) and has been rejected by every court that has considered it. See *Garcia v. United States*, 364 F. 2d 306 (10th Cir. 1966); *United States v. Baker*, 373 F. 2d 28 (6th Cir. 1967); *People v. Ward*, 72 Cal. Rptr. 46 (Cal. App. 1968); *People v. Patty*, 59 Cal. Rptr. 881 (Cal. App. 1967); *People v. Stenchever*, 57 Cal. Rptr. 14 (Cal. App. 1967); *Parnell v. State*, 218 So. 2d 535 (Fla. App. 1969); *People v. Palmer*, 265 F.2d 627 (Ill. 1970); *State v. Maes*, 469 P. 2d 529 (N.M. 1970) (cases cited therein); *McCart v. State*, 435 P. 2d 419 (Okla. Cir. 1968). See *State v. Holmes*, 476 P. 2d 878 (Ariz. App. 1970).

The ordinary situation involving an undercover agent is clearly non-custodial in all respects. However, there are cases dealing with a jailed suspect who makes a statement to his cellmate who conveys the information to the police. This has twice been approved. See *Holston v. State*, 208 So. 2d 98 (Fla. 1968); *State v. Spence*, 155

S.E. 2d 802 (N.C. 1967). There is an inherent Massiah problem involved in such situations. See Point XVIII (Massiah and Miranda).*

X I.

STATEMENTS AFTER TRAFFIC STOPS

Several courts have dealt with questioning of the driver of a vehicle stopped for traffic violations or for general investigation. Such questioning is thought to be non-custodial. This result is justified by several elements present in the traffic stop case: (a) the traffic stop is a common everyday occurrence endured by most citizens one or more times and is not likely to create a belief that one is under arrest or in custody, (b) the questions are usually brief and non-accusatory, (c) the situation seems to fit within the rubric of "general on-the-scene" investigation, and (d) there is usually no definite "focus" on the person questioned with respect to a specific crime.

The cases holding traffic stop inquiries to be non-custodial are: Wilson v. Porter, 361 F. 2d 412 (9th Cir. 1966); Allen v. United States, 390 F. 2d 476 (D.C. Cir. 1968); Jennings v. United States, 391 F. 2d 512 (5th Cir. 1968); Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969); United States v. Chadwick, 415 F. 2d 167 (10th Cir. 1969); Bendelow v. United States, 418 F. 2d 42 (5th Cir. 1969); United States v. LeQuire, 424 F. 2d 341 (5th Cir. 1970); United States v. Tobin, 429 F. 2d 1261 (8th Cir. 1970) (routine license check); United States v. Chase, 414 F. 2d 780 (9th Cir. 1969); United States v. Edwards, 421 F. 2d 1346 (9th Cir. 1970); United States v. Robert-

*The reference is to Point XVIII of the original monograph.

son, 425 F. 2d 1386 (5th Cir. 1970); Campbell v. Superior Ct., 479 P. 2d 685 (Ariz. 1971) (for as long as is necessary to complete the citation); State v. Perez, 442 P. 2d 125 (Ariz. App. 1968); People v. Nieto, 55 Cal. Rptr. 546 (Cal. App. 1967); People v. Gant, 70 Cal. Rptr. 801 (Cal. App. 1968); People v. Tate, 259 N.E. 2d 791 (Ill. 1970); People v. Ricketson, 264 N.E. 2d 220 (Ill. App. 1970); Montgomery v. United States, 268 A. 2d 271 (D.C. App. 1970) (conversation while officer wrote ticket); Schnepp v. State, 437 P. 2d 84 (Nev. 1968); State v. Twitty, 246 N.E. 2d 556 (Ohio App. 1969); Fritts v. State, 443 P. 2d 122 (Okla. 1968); State v. Lister, 469 P. 2d 597 (Wash. App. 1970); State v. Gray, 473 P. 2d 189 (Wash. App. 1970). See People v. Bolinski, 67 Cal. Rptr. 347 (Cal. App. 1968).

The two cases to the contrary rely upon the theory that a suspect must be considered in custody as soon as the officer has probable cause to arrest. People v. McFall, 66 Cal. Rptr. 277 (Cal. App. 1968); People v. Ceccone, 67 Cal. Rptr. 499 (Cal. App. 1968).

XII.

STATEMENTS DURING THE COURSE OF STOP AND FRISK

a. General Stop and Frisk One pressing question arising under Miranda is whether a stop and frisk situation constitutes custody for purposes of Miranda. In most jurisdictions having stop and frisk procedures the officer is usually authorized to ask a few simple questions, i.e., name, address, and explanation of actions. The right to ask the questions was neither approved nor disapproved in Terry v. Ohio, 392 U.S. 1 (1969), but the concurring

opinions of Justices White and Harlan seem to favor the idea. In any event, under state stop and frisk laws the power usually exists. See *People v. Rosemond*, 257 N.E. 2d 23 (N.Y. 1970); *People v. Gerule*, 471 P. 2d 413 (Colo. 1970); *Loyd v. Douglas*, 313 F. Supp. 1364 (S.D. Iowa 1970) (allowed to leave on refusal to answer).

In *People v. Manis*, 74 Cal. Rptr. 423 (Cal. App. 1969), an opinion well worth reading, the Court held that a short period of on the street questioning in connection with a stop and frisk does not require *Miranda* warnings. The Court reasoned first that formal custody does not exist in stop and frisk. Second, the Court noted that the language of the *Miranda* opinion had undergone a meaningful change from its preliminary print into its final form. In the Preliminary Print of the U.S. Reports the *Miranda* opinion referred to one in "custody or otherwise deprived of his freedom of action in any way". In the Official Report the phrase was changed to "custody or otherwise deprived of his freedom of action in any *significant* way" (emphasis added). The California Court reasoned that a stop and frisk though it was a deprivation of freedom of action was not a significant deprivation and thus *Miranda* was inapplicable.

The *Manis* case was followed in *People v. Glover*, 75 Cal. Rptr. 629 (Cal. App. 1969) and other California cases accept the general proposition espoused in *Manis*. See *People v. Mc Lean*, 85 Cal. Rptr. 683 (Cal. App. 1970); *People v. Singleton*, 63 Cal. Rptr. 324 (Cal. App. 1967); *People v. Weger*, 59 Cal. Rptr. 661 (Cal. App. 1967); *People v. Hubbard*, 88 Cal. Rptr. 411 (Cal. App. 1970); *People v. Herrara*, 90 Cal. Rptr. 802 (Cal. App. 1970) (temporary detention while car searched for aliens, single question asked about packages in the car).

At least two federal cases seem to support the **general** principle that questions asked during stop and frisk do not require warnings. See **United States v. Thomas**, 396 F. 2d 310 (2nd Cir. 1968); **Lowe v. United States**, 407 F. 2d 1491 (9th Cir. 1969). The District of Columbia has held that stop and frisk does not constitute custody for Miranda purposes. **Green v. United States**, 234 A. 2d 177 (D.C. 1967). See **White v. United States**, 222 A. 2d 843 (D.C. 1966); **Keith v. United States**, 232 A. 2d 92 (D.C. 1967). The same result is reached in **Utsler v. State**, 171 N.W. 2d 739 (S.D. 1969) and **People v. Armstrong**, 298 N.Y.S. 2d 630 (N.Y. App. 1969); **State v. Lister**, 469 P. 2d 597 (Wash. App. 1970); Cf. **State v. Miranda**, 450 P. 2d 364 (Ariz. 1969); **United States v. Marlow**, 423 F. 2d 1064 (5th Cir. 1970).

Several opinions seem to adopt the principle that stop and frisk questioning is non-custodial by allowing the police to "adcost" a person for a few inquiries. See **Morgan v. State**, 234 A. 2d 762 (Md. App. 1967); **Priestly v. State**, 446 P. 2d 405 (Wyo. 1968). See **State v. Farmer**, 476 P. 2d 129 (Wash. App. 1970) (stopping of persons who resemble a suspect).

It must be emphasized that the courts sustaining stop and frisk inquiries rely heavily on the brevity and neutrality of the questions. This suggests that what underlies the opinions is not only the belief that the situation is not "custodial", but also the belief that what takes places does not constitute "interrogation" as the Court in **Miranda** used the word.

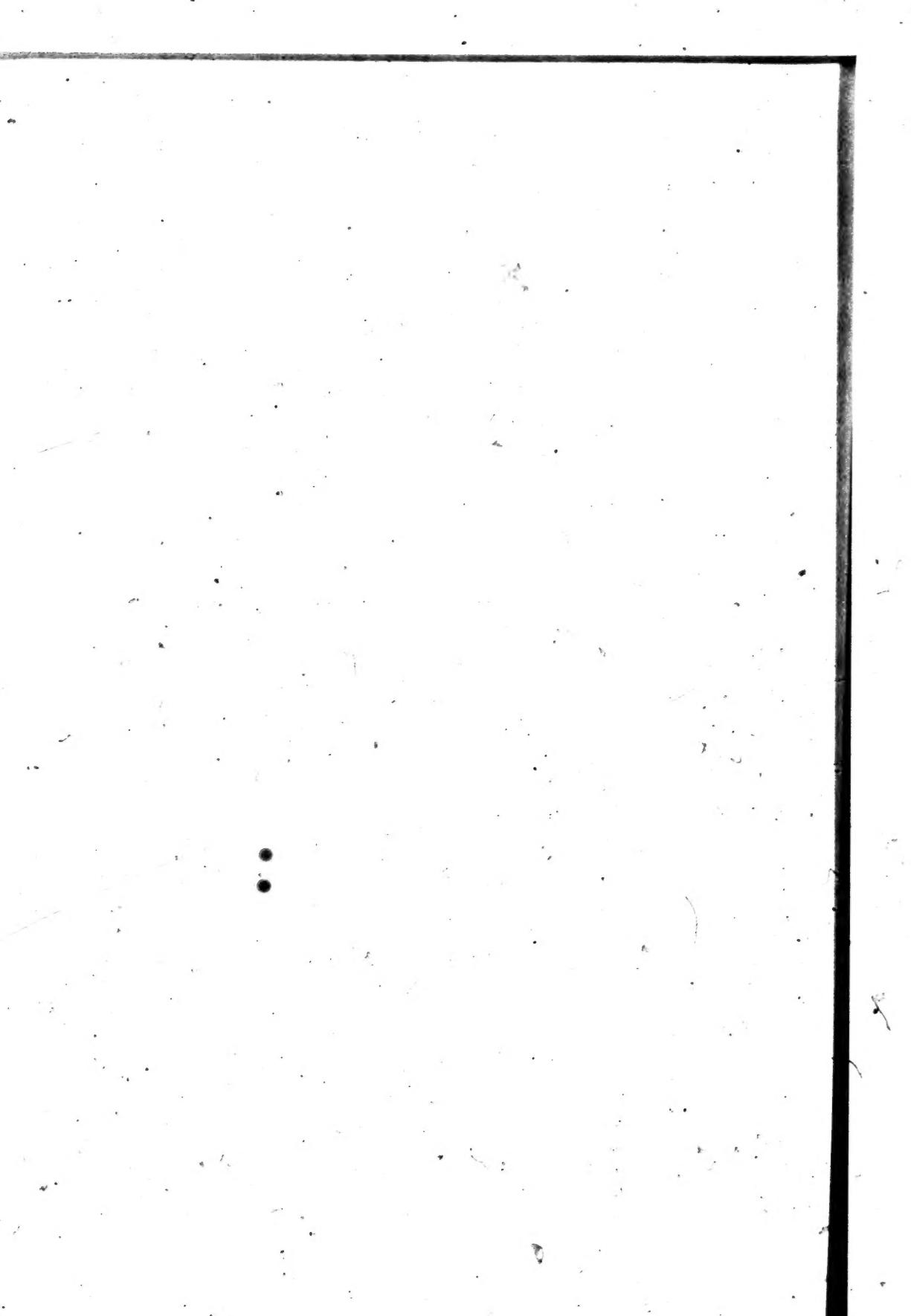
Finally, if a person is a proper subject of stop and frisk and nothing more—the right to stop and frisk may not include the right to take the person to the police station for extensive interrogation. The question is un-

decided. See *Morales v. New York*, 396 U.S. 102 (1969). It may well be that probable cause to arrest will be required in such a case. See *Doran v. United States*, 421 F. 2d 865 (9th Cir. 1970).

b. Questions Asked in the Interest of Self-Protection
Relying on the self-protection rationale of the stop and frisk cases the courts have extended admissibility to statements made immediately after arrest when those statements were made in answer to questions about where a known weapon was kept. The Courts reason that there is no "custodial interrogation" but it is probably more accurate to say what occurs is "custodial non-interrogation".

In *People v. Ramos*, 170 N.W. 2d 189 (Mich. App. 1969) the suspect's wife told the officers he had a gun. They apprehended the suspect and asked him where the gun was. He denied having it and was told to quit kidding and tell where it was. He pointed to his belt. The Court relied on the right of the officers to protect themselves as justifying the asking of the questions. Similarly, a Court has upheld the actions of an officer who interrupted his fellow officer—while he was giving the warnings—to ask where the gun was. *State v. Lane*, 467 P. 2d 304 (Wash. 1970). See also *Weissinger v. State*, 218 So. 2d 432 (Miss. 1969); *Ballew v. State*, 441 S.W. 2d 453 (Ark. 1969).

In one case where the officer was held justified in asking about a gun in order to protect himself, the Court advanced the theory that such a question was permissible as "general on the scene questioning," *Pope v. State*, 478 P. 2d 801 (Alaska 1970).





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No. 70-46

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v.

DIMAS CAMPOS-SERRANO,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

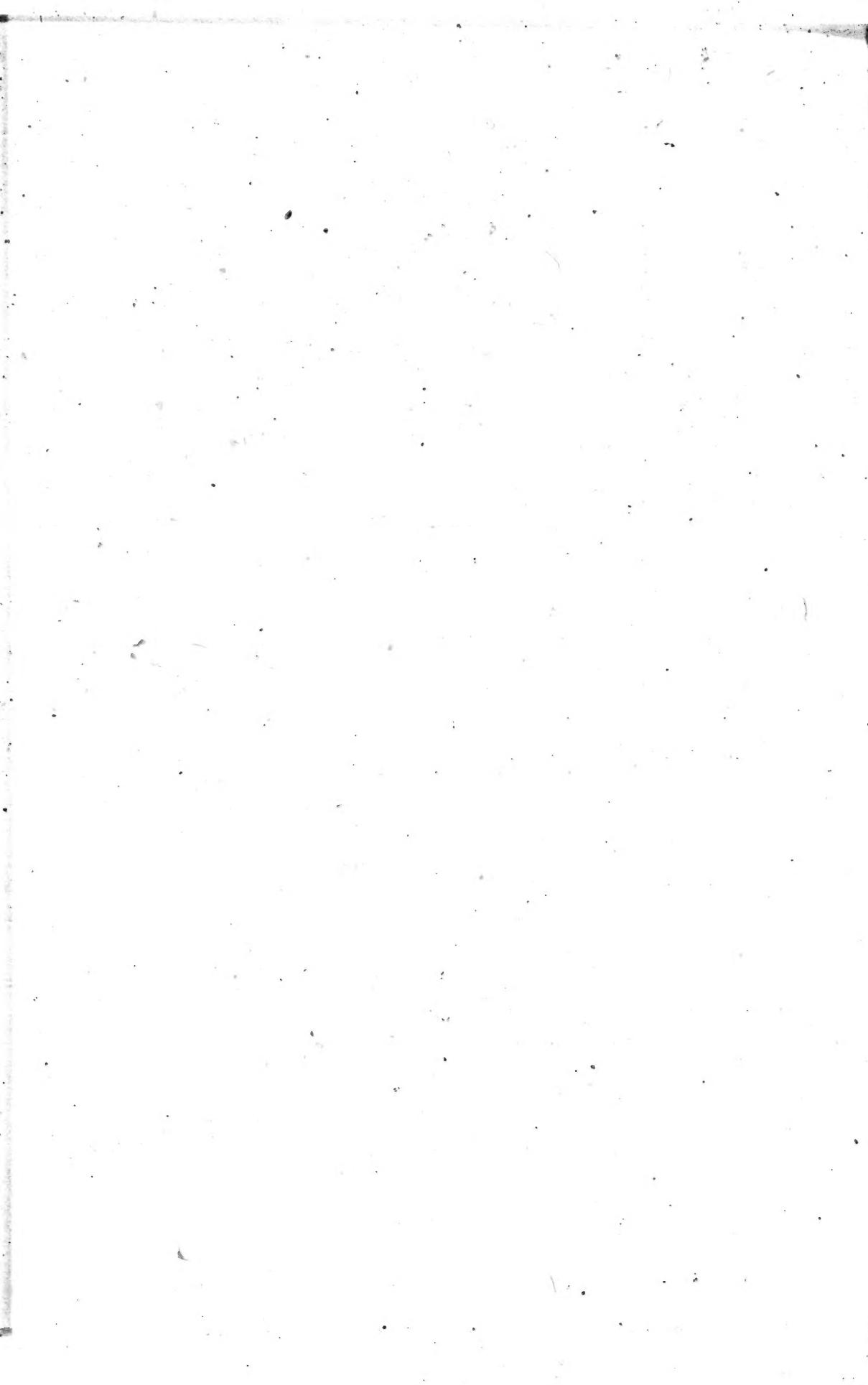
BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Questions Presented	2
Supplemental Statement	3
Argument	4
Introduction and summary	4
I. The INS investigators' demand for the suspected altered alien registration receipt card from the alien was not a transaction covered by the "required records" doctrine and constituted a violation of the alien's Fifth Amendment privilege against self-incrimination	7
A. Application of the privilege to an alien	7
B. The circumstances surrounding the demand and production of the altered card	7
C. Historical development of the privilege against self-incrimination and the "required records" exception	8
D. Pre- <i>Marchetti</i> restrictions on "required records" doctrine	15
E. <i>Marchetti</i> and subsequent cases	16
II. The circumstances surrounding the interrogation of this alien suspect created a coercive atmosphere requiring Federal agents to give a <i>Miranda</i> warning	20
III. The alien registration receipt card is not a "document required for entry into the United States" (18 U.S.C. 1546)	25
IV. In support of the judgment of the Court below the respondent urges the violation of the Fourth Amendment right against unlawful search and seizure, the Sixth Amendment in defendant's denial of confrontation of the witnesses against him, and the Fifth and	

Sixth Amendment denials of sufficient funds to secure the attendance of necessary material witnesses for the reversal of the criminal conviction	33
A. The interrogation of the defendant and the products of that interrogation were the result of an unlawful search and seizure in violation of the Fourth Amendment	33
B. The introduction into evidence of an Immigration file with a third party statement was inadmissible hearsay and denied the defendant the right to confront the witnesses against him under the Sixth Amendment	36
C. The failure to provide funds to secure the attendance of two necessary and material witnesses was a denial of due process under the Fifth Amendment and a denial of the effective assistance of counsel under the Sixth Amendment	38
Conclusion	40

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Cases:

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965)	4, 16, 19
Amos v. United States, 255 U.S. 313 (1921)	12, 13, 35
Ballman v. Fagin, 200 U.S. 186 (1906)	10
Barber v. Page, 390 U.S. 719 (1968)	38
Bolling v. Sharpe, 347 U.S. 497 (1954)	39
Boyd v. United States, 116 U.S. 616 (1886)	<i>passim</i>
Bumper v. North Carolina, 391 U.S. 543 (1968)	34
California v. Byers, ___ U.S. ___, 91 S.Ct. 1535 (1971)	19, 22
California v. Green, 399 U.S. 149 (1970)	38
Chapman v. California, 386 U.S. 18 (1967)	24
Chimel v. California, 395 U.S. 752 (1969)	35
Davis v. United States, 328 U.S. 582 (1946)	4, 12, 35
Dutton v. Evans, 400 U.S. 74 (1970)	38

Federal Power Commission v. Panhandler Co., 337 U.S. 498 (1949)	31
Fernandez-Gonzalez v. Immigration and Naturalization Service, 347 F.2d 737 (7th Cir. 1965)	32
Grosso v. United States, 390 U.S. 72 (1968)	18
Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963)	25
Haynes v. United States, 390 U.S. 85 (1968)	18
Heflin v. United States, 358 U.S. 415 (1959)	30
Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967)	24
In re Winship, 397 U.S. 358 (1970)	24
Jarecki v. G. D. Searle and Co., 367 U.S. 303 (1961)	29
Katz v. United States, 389 U.S. 347 (1967)	24, 33
Ladner v. United States, 358 U.S. 169 (1958)	30
Lau Ow Bew v. United States, 144 U.S. 47 (1892)	27
McFarland v. United States, 19 F.2d 807 (6th Cir. 1927)	27, 31
Marchetti v. United States, 390 U.S. 39 (1968)	4, 15, 16, 18, 24
Mathis v. United States, 391 U.S. 1 (1968)	23
Mattox v. United States, 156 U.S. 237 (1895)	38
Miranda v. Arizona, 384 U.S. 436 (1966)	<i>passim</i>
Olender v. United States, 210 F.2d 795 (9th Cir. 1954)	37
Orozco v. Texas, 394 U.S. 324 (1969)	5, 23, 33
Shapiro v. United States, 335 U.S. 1 (1948)	<i>passim</i>
Terry v. Ohio, 392 U.S. 1 (1968)	3
United States v. Ballard, 322 U.S. 78 (1944)	2
United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969)	23
United States v. Fernandez-Gonzalez, 64 C.R. 101 (N.D. Ill. 1964)	32
United States v. Menasche, 348 U.S. 528 (1955)	29
United States v. Sullivan, 274 U.S. 259 (1927)	11, 18, 19
United States v. White, 322 U.S. 694 (1944)	11
Wilson v. United States, 221 U.S. 361 (1911)	4, 10, 11
Wong Wing v. United States, 163 U.S. 228 (1896)	7

	Page
Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952)	37
Yaich v. United States, 283 F.2d 613 (9th Cir. 1960)	37
<i>Statutes and regulations:</i>	
43 Stat. 165	25
62 Stat. 771	26
66 Stat. 275	27
8 U.S.C. 1103	36
8 U.S.C. 1306	5, 28, 29, 5a
8 U.S.C. 1325	5, 29, 32
8 U.S.C. 1357	12, 15
18 U.S.C. 2113	30
18 U.S.C. 1546	<i>passim</i>
28 U.S.C. 1783	39
8 C.F.R. 264.1 (January 1969)	31
8 C.F.R. 103.10 (January 1969)	36
<i>Miscellaneous:</i>	
Rev. Proposed Rules of Evidence, 51 F.R.D. 315 (March 1971)	37
Stern and Gressman, <i>Supreme Court Practice</i> , (4th ed. 1969)	2, 25

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals as set forth in the Appendix is deficient, for it omits a substantial portion of the Opinion. (App. 124) The respondent would suggest the use of the copy of the Opinion in the Petition for Writ of Certiorari and as officially reported at 430 F.2d 173.

JURISDICTION

The respondent raises no question as to the procedural aspects of jurisdiction, but exercises the right to challenge the jurisdiction of the District Court insofar as it held that an alien registration receipt card was a document required for entry under 18 U.S.C. 1546.

STATUTE INVOLVED

The statute involved, 18 U.S.C. 1546 first paragraph, states:

Whoever, knowingly forges, counterfeits, alters or falsely makes any immigrant or nonimmigrant visa, permits, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . shall be fined not more than \$2,000 or imprisoned not more than five years, or both. 66 Stat. 275 (1952).

QUESTIONS PRESENTED

1. Was the Federal agent's interrogation and demand for incriminating evidence from a suspected alien immune from the Fifth Amendment privilege against self-incrimination because of the "required records" doctrine?
2. Did the circumstances surrounding the interrogation of this alien suspect create a coercive atmosphere requiring Federal agents to give a *Miranda* warning?
3. Is the alien registration receipt card a "document required for entry into the United States" under 18 U.S.C. 1546 so as to give jurisdiction over the subject matter?
4. Was the respondent prejudiced at trial by a violation of the Fourth Amendment right against unlawful search and seizure, a Sixth Amendment denial of confrontation of the witnesses against him, and denial of the Fifth and Sixth Amendment right to funds to secure the attendance of necessary and material witnesses?¹

¹Such arguments are urged in support of the judgment of the Court of Appeals. *United States v. Ballard*, 322 U.S. 78, 88 (1944); Stern and Gressman, *Supreme Court Practice* 314-315 (4th ed. 1969).

SUPPLEMENTAL STATEMENT

The Immigration and Naturalization Service (hereinafter INS) investigators on the morning of 19 November 1968 were conducting a task force arrest in search of aliens unlawfully in the United States. (App. 19, 40) Although the preparation for the task force arrest was made a day in advance (App. 19), the agents did not have an arrest warrant for Miguel Rico (App. 22) or Dimas Campos-Serrano (App. 42), and the INS investigators did not have a search warrant to search the apartment. (App. 42)

Upon the second entry of the investigators White and Burrow into the apartment, while accompanying their prisoner Rodriguez-Ortiz to obtain his clothing, this prisoner produced a key and opened the door. Investigator Burrow did not recall whether or not this prisoner had a key or whether he knocked upon the door to gain entry. (App. 48) Investigator Burrow did testify that this prisoner, Rodriguez-Ortiz, did not ever expressly consent to the entry of Investigator White or himself. (App. 53)

Investigator Burrow said he thought that since the prisoner Rodriguez-Ortiz had an altered alien registration receipt card, that there was a possibility that Mr. Campos' card also was altered. Prior to asking the defendant to produce this card for the second time, the INS agent did not advise him of his rights. (App. 49)

Prior to trial the defendant through counsel moved to dismiss the indictment for failure to state an offense and the improper application of the statute (18 U.S.C. 1546) to the Alien Registration Receipt Card (Form I-151). (App. 10-12) This motion was denied. (App. 3) The motion to dismiss was renewed with a motion for judgment of acquittal, but there was a finding of guilty. (App. 112-114).

At trial, the Government introduced the Immigration file of Diana Gloria Vargas-Garcia with the registration number of A14 713 099 which contained an application for a new alien registration receipt card and a statement that the card

had been stolen, which had been submitted and signed by Miss Vargas-Garcia. (App. 120-121). The defense objected to the introduction of the exhibit because there was no foundation, it constituted gross hearsay, and it denied the defendant his right of confrontation of the witnesses against him under the Sixth Amendment. (App. 111-112) Although there was no showing by the Government that the witness Diana Gloria Vargas-Garcia was unavailable (App. 111), the trial court received the exhibit into evidence. (App. 112).

ARGUMENT

INTRODUCTION AND SUMMARY

I

An alien is protected under the Fifth Amendment. The circumstances surrounding the demand for the altered card revealed that the defendant incriminated himself not only by the card itself, but by his production of it and his comments concerning this card. The factual circumstances and general rule announced in *Boyd v. United States*, 116 U.S. 616 (1886), indicate that the privilege should protect the defendant (respondent). The decision in *Wilson v. United States*, 221 U.S. 361 (1911), is limited to corporate records and one who holds records only in a representative capacity. *Davis v. United States*, 328 U.S. 582 (1946), is limited to a business setting and should not be applied to a compelled production of evidence from the defendant at his residence. The "required records" doctrine was formulated in *Shapiro v. United States*, 335 U.S. 1, 17 (1948), but it was limited to business records. In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), this Court held that a selective group inherently suspect of criminal activities could assert the privilege against self-incrimination in defense of an administrative order to register. The "required records" doctrine was refined in *Marchetti v. United States*, 390 U.S. 39 (1968), which enumerated the three elements necessary for the application of the *Shapiro* doctrine, but these ele-

ments are not present with respect to the defendant's possession of the alien registration receipt card. The third requirement especially was absent because the defendant was within a selective group, i.e. an individual, that was inherently suspect of criminal activities, i.e. possession of an altered alien registration receipt card.

II

The circumstances surrounding the interrogation of this alien suspect were similar to those in *Orozco v. Texas*, 394 U.S. 324 (1964), and required the giving of a *Miranda* warning. This alien suspect who could not speak English witnessed his roommates as prisoners of the INS agents who interrogated him. The disparity in position and the questionable status of the INS agents in the apartment created a coercive atmosphere and deprived the defendant of his freedom in a significant way.

III

The alien registration receipt card is not a "document required for entry into the United States" (18 U.S.C. 1546), for it is evidence of registration after the defendant has gained entry into the United States, and the ancillary provision permitting *reentry* after a temporary absence does not change the essential characterization of the card. Another statutory provision of the Immigration and Nationality Act of 1952 (8 U.S.C. 1306(d)) reveals an inconsistency that Congress could not have intended. The defendant was guilty of no more than a misdemeanor (8 U.S.C. 1325), which construction is favored under the principle of lenity. This construction would also give effect to each section of the Immigration and Nationality Act of 1952 and would be consistent with the administrative regulations that treat this card only as *evidence* of registration, not a document required for registration.

IV

The interrogation of the defendant and the products of that interrogation were also the result of an unlawful search and seizure in violation of the Fourth Amendment, for the agents went beyond the scope of the permissible entry, if any, in demanding the production of the defendant's card upon the second entry into his apartment. The introduction into evidence of an Immigration file with Miss Vargas-Garcia's statement was inadmissible hearsay and denied the defendant the right to confront the witnesses against him under the Sixth Amendment. No showing of the unavailability of the witness was made, and the Government failed to satisfy even the most minimal requirements for a hearsay exception. The failure to provide funds to secure the possible attendance of the two prisoners concerning the issue of consent to the entry of the INS agents was a denial of due process under the Fifth Amendment. The defendant's right to counsel under the Sixth Amendment was prejudiced by the delay in bringing the defendant before the court for appointment of counsel, who was not able to interview these two witnesses prior to their return to Mexico.

THE INS INVESTIGATORS' DEMAND FOR THE SUSPECTED ALTERED ALIEN REGISTRATION RECEIPT CARD FROM THE ALIEN WAS NOT A TRANSACTION COVERED BY THE "REQUIRED RECORDS" DOCTRINE AND CONSTITUTED A VIOLATION OF THE ALIEN'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. Application of the Privilege of an Alien.

An Alien is entitled to protection under the Fifth Amendment, United States Constitution. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

B. The Circumstances Surrounding the Demand and Production of the Altered Card.

The factual circumstances surrounding the successful interrogation by investigators of the INS are essential to a fair analysis of the applicability of the privilege against self-incrimination. Investigator Burrow had been in the apartment during the retrieval of the clothes of Miguel Rico, his prisoner, when his fellow investigator, Jacobs, interrogated the defendant. At that time he examined the card of the defendant, but found no flaws in it. After another alien Rodriguez-Ortiz was arrested shortly thereafter for possession of an altered alien registration receipt card, agents Burrow and White returned to the apartment where the defendant was located. They entered with their prisoner Rodriguez-Ortiz to secure his clothing, but this time Investigator Burrow asked for the respondent's alien registration receipt card. This investigator stated his reason for asking for the card: "Because Mr. Ortiz presented an altered—what appeared to be an altered alien registration receipt card—and I thought since there was one in the apartment there was a possibility that Mr. Campos' card too was altered." (App. 48) Then Mr. Campos produced the altered card. When the defendant handed the card to the agent, such tendering

constituted proof of his possession of the unlawful card. Also this Federal investigator asked him if he was sure that the card was his. (App. 49)

This short inquiry produced sufficient evidence to convict the defendant of the unlawful possession of a falsely made or altered alien registration receipt card in violation of 18 U.S.C. 1546.² The alien registration receipt card itself was not the sole incriminating evidence produced, even though it was a principal and necessary part of the case against the defendant. The elements of the charged offense may be summarized as (1) the defendant's knowing possession of the card, (2) the altered or falsely made card, and (3) the defendant's knowledge that it was falsely made (See Indictment, App. 7-8; 18 U.S.C. 1546). The card alone would not establish guilt. His handing over of the card established knowledgeable possession, and his comments recognized the alterations or falsity of the card. In this instance, as noted by the Court of Appeals, the production of the forged card was substantially equivalent of the individual saying "I did it." (App. 127)

C. Historical Development of the Privilege Against Self-Incrimination and the "Required Records" Exception.

The recognized starting point in the development of the Fifth Amendment privilege against self-incrimination is the landmark case of *Boyd v. United States*, 116 U.S. 616 (1886). An information was filed for the seizure and forfeiture of thirty-five cases of plate glass. A statute provided forfeiture, as well as criminal penalties, for those who made a false statement in connection with imported merchandise. The action of the District Court was only for the civil forfeiture. After the goods were seized, the petitioner claimed the goods. The petitioner pursuant to a notice to produce

²The respondent accepts the judgment of the Court of Appeals for this portion of the argument but reserves the right to question the application of this statute to this type of card.

presented a certain invoice concerning a prior shipment which was necessary and important in the forfeiture proceeding. This Court held that the notice to produce the invoice, the order, and the underlying statute authorizing such production were unconstitutional. 116 U.S. 616, 638.

The opinion of Justice Bradley held that this forceable requirement of a person's private papers was within the protection of the Fourth Amendment:

It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure. 116 U.S., 616, 622.

The Court then went on to point out the close relationship of the Fourth and Fifth Amendments. 116 U.S. 616, 633.

The critical distinction in the *Boyd* case is the fact that the papers involved were "private papers." However, the specific private paper was an invoice, a document furnished by someone else. The Court did not in detail describe what constituted a private paper, but it would appear that the application of *ejusdem generis* rule would indicate that the alien registration receipt card possesses a more personal quality than an invoice on plate glass. A characterization of the document as a "private" or a "public" document serves no useful purpose, for the privilege against self-incrimination was to protect a defendant from producing that evidence which would result in his conviction, or as in the *Boyd* case, the forfeiture of his property. In the *Boyd* case the defendant was required to produce a specific invoice, a single document that would prove the case against him, and in the instant case, the respondent was required to produce a single document.

The "required records" exception, for whatever vitality it still possesses, has been traditionally limited to the cir-

cumstances of corporate or other business records. The interest of the Government in such records required to be kept is directed at general records, such as records kept in the ordinary course of business. A governmental inquiry of such records would not violate the privilege against self-incrimination. If, however, that inquiry narrows down to a specific document—a document thought to establish guilt of the defendant, then the Fifth Amendment privilege against self-incrimination comes into play, and it would be contrary to the simple reading and intent of the Constitution to allow the “required records” exception to defeat it.

In *Ballman v. Fagin*, 200 U.S. 186 (1906), Justice Holmes wrote the opinion in which it was held that the defendant could not be required to produce a cash book before a Grand Jury where it might incriminate him.

The Government in its Brief (p. 9) contends that the decision in *Wilson v. United States*, 221 U.S. 361 (1911), was the origin of this “required records” doctrine. In *Wilson* the trial Court issued a subpoena duces tecum to the corporation to have certain records, including a letter press copy book, of the corporation brought before a Grand Jury. The books were kept in the possession of the president, Wilson, but the Board voted to turn over the books to the Grand Jury. Wilson refused, and provisions were even made so that Wilson’s personal correspondence could be withdrawn from the books requested prior to presenting them to the Grand Jury. The president still refused. The Court, through the opinion of Justice Hughes, held that the privilege against self-incrimination could not be used to defend against the production of the corporate books. The Court made specific reference to the *representative* capacity in which the corporate books were held. However, the Court went further than required for disposition of the case and announced that the privilege was not available to public officers who kept records or even to those who had in their possession “records required by law to be kept in order that there may be suitable information of transactions which are the appro-

priate subjects of governmental regulation and the enforcement of restrictions validly established." 221 U.S. 361, 380. The holding in the *Wilson* case was succinctly evaluated by Justice Frankfurter in his dissenting opinion in *Shapiro v. United States*, 335 U.S. 1 (1948), where he stated:

The *Wilson* case was correctly decided. The Court's holding boiled down to the proposition that "what's not yours is not yours." 335 U.S. 1, 58.

Justice McKenna dissenting in the *Wilson* case did accurately summarize the purpose of the privilege:

The spirit of the privilege is that a witness shall not be used in any way to his crimination. When that may be the effect of any evidence required of him, be it oral or documentary, he may resist. He cannot be made use of at all to secure the evidence. This must necessarily be the extent of the privilege. 221 U.S. 361, 390-391.

The defendant recognizes and respects, as did the Court of Appeals (App. 127), the legitimate right of the Government to conduct a neutral inquiry and to require the submission of a report. The Government could require a person to make a return even though that person might be privileged from completing certain answers in the return. *United States v. Sullivan*, 274 U.S. 259, 263 (1927).

In *United States v. White*, 322 U.S. 694 (1944), this Court upheld the contempt citation for a union officer who failed to produce the records sought by a subpoena duces tecum issued to a local of a union requiring its constitution, by-laws, and records showing collections of work permit fees. This Court held that the privilege was personal and could not be utilized by a corporation or organization and outlined the ambit and purpose of the privilege:

The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and *investigatory proceedings* upon a plane of dignity, humanity and impartiality. It is designed

to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and *authenticate* any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal framework as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness. 322 U.S. 694, 698-699. (Emphasis added).

In the instant case the respondent was required to "authenticate" the document by his production of that card thereby establishing his possession of this document as his, which was an essential element of the offense. The INS investigators were able to demand that document from him "by force of law" under 8 U.S.C. 1357(a)(1) which permitted them to "interrogate any alien or person believed to be an alien as to his right to be in or to remain in the United States." This compulsion by law to produce the altered document during an investigation narrowed to this specific purpose is not consistent with the ban established by the Fifth Amendment.

The disposition in *Davis v. United States*, 328 U.S. 582 (1946), turned upon the lawfulness of a search and seizure. However, the defendant's handing over of the contraband gasoline ration coupons did touch upon the protection of the privilege against self-incrimination under the Fifth Amendment. The important and immediate distinction in the *Davis*

case was that the defendant was properly arrested prior to the questioned search. Pursuant to the demands of the agents *at his business establishment*, he produced the unlawful gasoline ration coupons. This Court indicated that because the Government owned the coupons they were not private papers, but the property of the Government and subject to inspection and recall by it. The Court made careful reference to the fact that it was a *business establishment* and distinguished the decision in *Amos v. United States*, 255 U.S. 313 (1921),³ in which a private residence was searched. In the instant case Campos-Serrano was subjected to the demand at his private residence, and the *Amos* case would appear applicable to the instant situation to provide protection. Justice Frankfurter in his dissent criticized the "so-called public papers" exemption which would excuse compliance with the Fourth Amendment and the defendant's right of privacy. 328 U.S. 582, 596-597.

The "required records" phrase was referred to by this Court for the first time in *Shapiro v. United States*, 335 U.S. 1, 17 (1948). In this case the petitioner was convicted of a tie-in sales in violation of regulations under the Emergency Price Control Act. The petitioner had to respond to the administrative subpoena duces tecum of the Office of Price Administration to bring with him invoices, sales books, ledgers, and inventory records. These records requirements were established for businesses, and the Court held that they applied to non-corporate businessmen. 335 U.S. 1, 19. The broad language of the opinion of Chief Justice Vinson went far beyond the factual circumstances contained in the *Shapiro* case for the result obtained, but even this opinion recognized that there were limitations:

³Revenue agents came to the defendant's house in search for violations of the law and were allowed entry by the defendant's wife in deference to their authority. There was no valid consent. The analogy is easily drawn to the instant case, except that the INS agents on the second entry had a very narrow purpose.

It may be assumed at the onset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself. 335 U.S. 1, 32.

Justice Frankfurter, one of the four dissenters in the *Shapiro* case, raised the critical question as to whether or not "public records" fell outside the protection of the Fifth Amendment. His comment that "Ready-made catch-phrases may conceal but do not solve serious constitutional problems" has definite application in this case. His analysis (335 U.S. 1, 50-70) points out the necessity for a clear delineation and limitation of the "required records" exception to the privilege against self-incrimination. If the *Shapiro* case is limited to the situation involving the records of businessmen, then it could not be properly extended here to the situation of Campos-Serrano. Justice Frankfurter made reference to a "parade of horribles" into which the defendant would fall, because under the unrestrained application of the "required records" exemption the Government would be able to enter a man's home to examine or seize a public record, with or without a search warrant, at any time. 335 U.S. 1, 54-55. Justice Jackson in his dissenting opinion in *Shapiro* predicted the unwarranted extension of this doctrine that the Government now seeks to apply to Campos-Serrano:

The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who can then use it to convict him. Today's decision introduces a principle of considerable moment. Of course, it strips of protection only businessmen and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice, "to the limits of its logic." 335 U.S. 1, 70.

In the instant case, the INS investigators used their statutory power (8 U.S.C. 1357(a)(1)) to require the defendant to prove conclusive evidence of his guilt of the offense of possession of an altered and forged alien registration receipt card.

D. Pre-*Marchetti* Restrictions On "Required Records" Doctrine

The Government contends that prior to the decision in *Marchetti v. United States*, 390 U.S. 39 (1968), there were only two limitations under the Fifth Amendment on its power to require the maintenance and disclosure of documents and information: (1) the requirement that the disclosure serve a legitimate regulatory purpose and (2) that the requirement would not have the effect of compelling members of a group inherently suspect of criminal activities. *Brief of the United States* p. 14. The defendant would contend that the first requirement, as stated, far exceeds the actual decision in *Shapiro v. United States*, but this analysis points up the interrelationship of the two requirements. If the first requirement was not restricted, Congress could eliminate the privilege. If the first interrogation in the apartment of the defendant might be treated as an exercise of the "legitimate regulatory purpose" in determining the status of a person believed to be an alien by an INS official, such characterization could not properly be affixed to the second interrogation. The entry into the apartment for the second time of an INS investigator, armed with the suspicion that this alien possessed an altered alien registration receipt card, fell outside of his "general legitimate regulatory inquiry" as to status of aliens within the United States and was for the purpose of extracting a document, the subject matter of a later felony prosecution. The underlying statute (8 U.S.C. 1357(a)(1) authorizes Government agents to inquire as to the status of persons within its borders believed to be aliens. That was clearly not the purpose of the second inquiry.

In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), this Court held that an order of this administrative board to register an individual member of the Communist Party violated the individual's privilege against self-incrimination. An admission of membership in this party might have been used to criminally prosecute for failure to register. The principal limitation restricting the inquiry by the INS investigators upon their second entry into the apartment was the rule in the *Albertson* case (the second requirement), and the Court of Appeals made reference to this case (App. 127). The rationale of the *Albertson* case was recognized by the Court of Appeals when it said:

However, when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged "cards" and the defendant's card had previously been examined, the privilege should apply. (App. 127).

E. *Marchetti* and Subsequent Cases

In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that the statutory requirements of registration violated the privilege against self-incrimination, and the convictions for wilful failure to pay an occupational tax on gambling and wilful failure to register as a gambler were set aside. The Court stated by whom the privilege could be used:

The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed, on what must ordinarily be a fiction, have precisely the infirmities

which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred." 390 U.S. 39, 51.

In the *Marchetti* case the Court outlined three essential elements of the *Shapiro* doctrine. The three elements were that (1) the defendant was obliged to keep and preserve records "of the same kind as he customarily kept," (2) that the records possessed "public aspects," and (3) that the records were imposed in an essentially noncriminal and regulatory area of inquiry and not directed to a selective group inherently suspect of criminal activities. 390 U.S. 39, 55-57.

It is obvious that the record kept in the instant case, the alien registration receipt card, is not of a kind customarily kept, and the Government argues that this requirement has no application in this case. (*Brief of the United States* p. 18). To eliminate this requirement would constitute an unwarranted expansion of the decision in *Shapiro v. United States*, 335 U.S. 1 (1948), and this exception of the privilege against self-incrimination should not be so easily altered and expanded. Although it could be argued that the alien registration receipt card does contain public aspects under the statutory scheme to identify alien immigrants, it also contains very personal aspects in acting as an identification card. The document is personalized because of the identifying material that it contains, including the photograph of the alien, and it is certainly not the type of public document outlined in *Shapiro v. United States* which was concerned with the operating documents of a business. It would be difficult to say that this was less than the "private" paper (the invoice) in *Boyd v. United States*, 116 U.S. 616 (1886). Since this characterization as a "public document" cannot be easily made in this case, this "required records" exception should not be permitted "to swallow up the rule" (the privilege). The third requirement focuses on the critical aspect of this case: An alien who may possess an alien registration receipt card is generally not one of a selec-

tive group and suspect of criminal activity, and therefore, the Government may enforce its noncriminal regulatory scheme of inquiry as to the status of such aliens in the United States without conflict with the privilege. However, this right of general inquiry evaporated when the INS investigators sought to use this statutory power to have the defendant produce specific incriminating evidence, the altered card, for then the limitation of the *Albertson* case came into play because this type of inquiry conflicted with the privilege.

Both the exception to this privilege and its limitation were recognized by Justice Brennan in his concurring opinion in *Marchetti v. United States*, and *Grosso v. United States*, 390 U.S. 72 (1968), when he stated that he sought not to have the holdings modify the decision in *United States v. Sullivan*, 274 U.S. 259 (1927), or *Shapiro v. United States*, but went on to note, "On the other hand, we know that where the governmental scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, its contravenes the principle." 390 U.S. 72, 73.

In *Haynes v. United States*, 390 U.S. 85 (1968), the conviction of the petitioner for knowing possession of a firearm which had not been registered as required by statute was reversed. The invalid governmental tax statutes were directed at those "inherently suspect of criminal activities." The Court held:

Nonetheless, these statutory provisions, as now written cannot be brought within any of the situations in which the Court has held that the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application. See *United States v. Sullivan*, 274 U.S. 259; *Shapiro v. United States*, 335 U.S. 1." 390 U.S. 85, 98.

Recently this Court had reason to rule on a not too dissimilar situation involving the state statutory "hit-and-run"

requirement that a person involved in an accident stop and give his name and address. This Court was required to balance the right of society to acquire essential information and the right of the individual to his privilege against self-incrimination. The giving of the name and address would not constitute incrimination, but it could act as a "link in a chain" leading to his prosecution and conviction. The Court in the opinion of the Chief Justice stated, "In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California v. Byers*, ____ U.S. ___, 91 S.Ct. 1535, 1538 (1971). For Campos-Serrano the hazard could not have been greater. The Chief Justice then referred to and quoted the *Albertson* decision and its distinguishing of the *Sullivan* case:

In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a *highly selective group inherently suspect of criminal activities*. Petitioner's claims are not asserted in an *essentially noncriminal and regulatory area* of inquiry, but against an inquiry in an area permeated with criminal statutes, where a response to any of the * * * questions in context might involve the petitioners in the admission of a crucial element of crime. 382 U.S. at 79, 86 S.Ct. at 199. (Emphasis in original). 91 S.Ct. 1535, 1538.

Dimas Campos-Serrano was within a highly selected group, i.e. a single individual, inherently suspect of criminal activities, i.e. possession of a forged card. The interrogation and demand conducted upon the second inquiry transcended any essentially noncriminal and regulatory area of inquiry into his status as an alien, and therefore he possessed the privilege against self-incrimination.

Efforts to erode this fundamental constitutional right have always been supported by arguments of governmental efficiency and the facilitation of prosecutions, but the admonitory sentiments (*obsta principiis*) of Justice Bradley in *Boyd*

v. United States, 116 U.S. 16 (1886), are worth reechoing for their even greater meaning today:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of their right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. 116 U.S. 616, 635. Quoted by Justice Frankfurter, dissenting opinion in *Shapiro v. United States*, 335 U.S. 1, 69, and portion cited by Chief Justice Warren in *Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

II

THE CIRCUMSTANCES SURROUNDING THE INTERROGATION OF THIS ALIEN SUSPECT CREATED A COERCIVE ATMOSPHERE REQUIRING FEDERAL AGENTS TO GIVE A MIRANDA WARNING

The giving of the warning required in *Miranda v. Arizona*, 384 U.S. 436 (1966), depends upon whether the defendant Dimas Campos-Serrano was "in custody or otherwise deprived of his freedom of action in any significant way," 384 U.S. 436, 445, and in a setting in which his freedom of action was curtailed in a significant way. 384 U.S. 436, 467. Campos-Serrano had no criminal record or any prior violation of the Immigration laws (App. 116) giving rise to the natural inference that he had only limited contact with police or INS investigators. He was further handicapped by his inability to speak English, a language barrier not constituting any form of restriction to the experienced bilingual investigators. Campos-Serrano was on alien soil in a ques-

tionable status; he had no standing to challenge or assert legal restrictions that might be imposed upon the police agents by virtue of a constitution unfamiliar to him. These INS investigators made an unhesitating authoritative demand in the defendant's own apartment. Their conduct lacked any showing of deference to another human being—even to a limited respect of privacy in his own home. The fact that the agents on both their first and second entry were there only for the purpose of guarding another prisoner while that prisoner retrieved his clothing, did not in any way inhibit their demands or interrogation. The circumstances manifested the overwhelming power of these police agents to seize persons—aliens like the defendant, and this fact was readily understood by Campos-Serrano. The defendant had no choice but to submit to the demands and directions of these Federal agents, and when the choice of an individual is so circumscribed by the overpowering presence and manifestation of the Federal agents, it is submitted that this individual is in custody or otherwise deprived of his freedom in a significant way.

These INS investigators, operating without judicial or administrative warrants, were participants in a Task Force Arrest Party. Their assigned mission was to seize and apprehend persons illegally in the United States. They possess both the legal power and its aura; and they were clearly a forceful arm of the Government. Although there may be certain advantages in this type of roundup of illegal aliens, such Federal agents, operating without some prior judicial approval, should be most circumspect in their individual activities and should painstakingly respect the rights granted by the Constitution to any person, even aliens or persons illegally in the United States.

Our system of justice in recognizing the inherent worth and dignity of each person seeks to establish some minimum parity between the Government and the individual. It is a most difficult adjustment. One cannot be put at a serious disadvantage to the other, because the essential equilibrium

between the individual and the state is a result of delicate, interdependent dynamics that must survive in the "real world." Our founding fathers, armed with the lessons of history, adopted the Fifth Amendment privilege against self-incrimination. This provision was neither unwise nor impractical. The injury to the Government is infinitesimal compared to the injury to the individual by the compelled disclosure of evidence of a crime. The rack and the rope and their ancillary techniques, hopefully, are anachronistic and obsolete tools of Government. Sophisticated pressures have replaced these obnoxious physical instruments. Such pressures often depend upon the standing of the individual with respect to the agents of the state, and in this case there existed an enormous disparity, in which the Government agents clearly held the commanding position. This was not the courteous interrogation of the revenue agent of the businessman. With a sophisticated businessman, the agents would probably confront a person who understood the authority of his interrogators and his possible right to resist. Even there the businessman might be at a serious disadvantage if he did not know that he was a suspect of a criminal wrong. With Campos-Serrano the investigator took advantage of the disparity of the position and his legal authority to force the production of what was thought to be, and proven so, a forged card, and under these circumstances the *Miranda* warning (384 U.S. 436, 479) should have been given.

It is difficult to specify or detail a more precise requirement as to when the Fifth Amendment privilege necessitates a warning by law enforcement officers. One might attempt to measure the intensity of the need for protection of the principle by the proximity of the possible incrimination. If the statement might provide only leads, then there may be a less requirement for a warning.⁴ If the requested produc-

⁴ See *California v. Byers*, ____ U.S.____, 91 S.Ct. 1535 (1971), *supra*.

tion constituted the very evidence of the crime then the warning might be required. In *Mathis v. United States*, 391 U.S. 1 (1968), the defendant identified certain tax forms and his signature thereon during a tax investigation conducted at a state prison, and in *Orozco v. Texas*, 394 U.S. 324 (1969), the defendant admitted ownership of and advised as to the location of a gun involved in the criminal shooting. Campos-Serrano was in far greater danger of having his privilege against self-incrimination jeopardized by the production of an alien registration receipt card, and he was in much greater need for the advice concerning the existence of such constitutional privilege.

The Court of Appeals determined that there was sufficient compulsion to trigger the *Miranda* warning requirement. The Court of Appeals found the case to be within the boundaries of the custodial interrogation of *Orozco* and the noncustodial interrogation in *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), which held that a criminal tax investigator had to give a *Miranda* warning to a suspect questioned at his place of business. Dimas Campos-Serrano was entitled to make an intelligent exercise of his constitutional privilege, and he was entitled to some statement by the investigator acknowledging that they were bound by the Constitution to respect the exercise of such privilege. The Court of Appeals did not hold that the decision was the equivalent of the rule announced in the *Dickerson* case,⁵ and the decision in the *Orozco* case appears to be more appropriate. The *Orozco* decision has been characterized by some as extending the *Miranda* warning requirement beyond the

⁵ Although the Government is dissatisfied with the judgment of the Seventh Circuit Court of Appeals in *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), this case is not now (nor appears to have been) subject to review by this Court. Both the Government's Brief (p. 30) and the Brief of the State of Illinois as Amicus Curiae (p. 3) placed substantial emphasis on the error of that decision. This case should not be used as the vehicle for review of the *Dickerson* case.

police station. Hopefully, the protection provided by the Fifth Amendment is not restricted to the police station. In this type of case, there would have been no police station interrogation. The only interrogation of any import would have taken place "on the street" or away from the INS headquarters, for once the suspect was taken into custody he would be processed administratively.⁶ The interrogation conducted in the apartment had the equivalent of a police station interrogation, and the *Miranda* warning should be held applicable to this situation. It would be an unrealistic distinction to make the privilege depend upon some geographical locale. See *Katz v. United States*, 389 U.S. 347, 351, (1967).

The *Miranda* test for the application of the prescribed warning requirement—"taken into custody or otherwise deprived of his freedom by the authorities in any significant way" (384 U.S. 436, 478) is a fundamental and reasonable standard. It is in the nature of "reasonable doubt" (cf. *In re Winship*, 397 U.S. 358 (1970)), and "harmless error" (cf. *Chapman v. California*, 386 U.S. 18 (1967)). Such basic standards are often only confused by unnecessary amplification which is more often than not circuitous. A test upon a test is suggested by the Government (*Brief of the United States*, p. 32 and *Brief of the State of Illinois as Amicus Curiae*, pp. 14-15), when it suggests the "reasonable innocent man test." Does not the privilege extend to the guilty as well as the innocent? The answer would appear to be obvious, yes. *Marchetti v. United States*, 390 U.S. 39, 51 (1968). The very opinion quoted for this standard, *Hicks v. United States*, 382 F.2d 158 (D.C. Cir. 1967), written by the Chief Justice, then a Circuit Judge, points out that even with the "reasonable innocent man" test the defendant's

⁶Even though the INS agents arrested Campos-Serrano for a felony on 19 November 1968 and held him continuously in custody, his first appearance before a judicial officer appears to be 16 December 1968. (App. 3) This unnecessary delay resulted in the suppression of an alleged confession. (App. 92-93)

subjective beliefs are a factor to be considered by the trial court along with evidence of his conduct *and all the surrounding circumstances*. 382 F.2d 158, 161. The elusive proposed standard will be most difficult to apply, for the application is to a state of mind. The court applying the standard to the defendant's state of mind will be often unwilling to accept the statements of the best source, for reasons which are quite obvious. The *Miranda* standard, applied to physical facts as well as to the state of mind of both the interrogators and the interrogated, appears far more reasonable and understandable. The determination of the best type of test to be followed in determining the existence of custody or restraint of freedom is not necessary to the fair disposition of the case, for the very nature and circumstances of this interrogation constituted the precise evil the Fifth Amendment was designed to obviate.

III

THE ALIEN REGISTRATION RECEIPT CARD IS NOT A "DOCUMENT REQUIRED FOR ENTRY INTO THE UNITED STATES" (18 U.S.C. 1546)⁷

The defendant was indicted and convicted of possession of an altered and falsely-made "document required for entry into the United States" in violation of 18 U.S.C. 1546. This statutory crime was first enacted by the Immigration Act of 1924 (Section 22, 43 Stat. 165), but applied only to an "immigration visa or permit." In 1948 it was compiled as

⁷The jurisdictional issue as to the sufficiency of the indictment to state an offense is raised in this Court, as it was in both the district court and the court of appeals. Jurisdiction is a threshold question that should again be reviewed by this Court. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963), Stern and Gressman, *Supreme Court Practice* 298 (4th Ed. 1967). This matter was also asserted in this Court on the behalf of Dimas Campos-Serrano in a combined conditional cross-petition for writ of certiorari and brief in opposition to the petition in this case, filed as No. 6382, October Term 1970. No action has been taken on this cross-petition by the Court.

a part of the Federal Criminal Code (62 Stat. 771). In the comprehensive Immigration and Nationality Act of 1952 this Criminal Code section was extended to include "immigrant or non-immigrant visa, permit, or other document required for entry into the United States." (66 Stat. 275). The question as to jurisdiction is whether an alien registration receipt card, Form I-151 of the INS, is such a document.

The alien registration receipt card serves as evidence of the registration of the holder as an immigrant and contains information identifying the resident alien. This card also contains a statement that it will be honored in lieu of a visa and passport on the condition that the rightful holder is returning to the United States after a temporary absence of not more than one year, and is not subject to exclusion under any provision of the Immigration Laws. (Govt. Ex. 1, App. 107, 119). The very name and nature of an alien registration receipt card indicates that its acquisition occurs after entry into the United States, and the ancillary authorization is strictly limited to a *temporary* absence in which the person is *reentering*.

The original statute was limited to two types of documents—an immigrant visa and a permit—and the 1952 amendment added the "non-immigrant visa" and "document required for entry." The Congressional intent manifested the continued pattern of a limited class of documents, for Congress would not have added "non-immigrant visa" if it intended the "document required for entry" to be a "catch-all" provision. Hence, Congress took pains to specify the very nature of the documentation to be made the subject matter of this criminal offense, and it could not reasonably be contended that Congress by this generic terminal phrase intended to authorize the INS the authority to determine the type of documents to be included within the felony offense. The enactment reveals the continued limitation to documents to serve as legal authority for the initial entrance of aliens into this country, but could not be reasonably extended to documents that provide identification subsequent to entry.

Although the term "permit" is 18 U.S.C. 1546 had reference to a reentry permit (Section 10 of Immigration Act of 1924), the qualifying term now set forth in Section 1546 is "entry." Since the alien registration receipt card is used only in a *reentry* situation, it must be treated as a document required for *reentry*, but not entry. In *Lau Ow Bew v. United States*, 144 U.S. 47 (1892), the Court held that the Chinese Exclusion Act of 1882, which required a certificate from the Chinese government for every Chinese person about to come into the United States, did not apply to a Chinese merchant who had previously been a United States resident for seventeen years. The *Lau Ow Bew* distinction between an "entry" and a "reentry" was referred to in *McFarland v. United States*, 19 F.2d 807 (6th Cir. 1927), dealing with this same statutory provision (then 8 U.S.C. 220), where the Court of Appeals refused to give an interpretation to the statute that was "verbally possible" and reversed the conviction. The Court of Appeals for the Seventh Circuit did not agree with this line of reasoning (App. 125), but the mode of statutory construction previously adopted by this Court and as interpreted by the Court of Appeals for the Sixth Circuit in the *McFarland* case should not have been disregarded. The distinction was geared to a situation involving immigrants, and Congress would be presumed to recognize the fact that such distinction existed at the time of the subsequent Immigration and Nationality Act of 1952. (Pub. L. 82-414, 66 Stat. 275).

The comprehensive codification of the existing laws relating to Immigration and Nationality in the 1952 Act did not only include Title 8 (aliens and nationality), but also included the amendment to 18 U.S.C. 1546 (Section 402(a)). After a careful comparison of certain provisions appearing in Title 8 as compared with 18 U.S.C. 1546, there emerges the design of Congress not to include the alien registration receipt card within the terms of 18 U.S.C. 1546 regulating documents required for entry. The second paragraph of 18 U.S.C. 1546 expressly prohibits the counterfeiting of a document required for entry:

Whoever . . . makes any print, photograph, or impression in the likeness of any immigrant or non-immigrant visa, permit, or other document required for entry into the United States . . . shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

In this same law enacted by Congress there was also promulgated another section specifically governing the counterfeiting of an alien registration receipt card. Section 266(d) of the Immigration and Nationality Act of 1952 (then and now 8 U.S.C. 1306(d)) provided:

Any person, who with unlawful intent, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any certificate or alien registration or any *alien registration receipt card*, or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be prescribed by the Attorney General, shall upon conviction be fined not to exceed \$5,000 or be imprisoned not more than five years, or both. (Emphasis added).

If the provision for "documents required for entry" of 18 U.S.C. 1546 applies to alien registration receipt cards, then Congress need not have adopted another specific section in 8 U.S.C. 1306(d) to cover the counterfeiting of such documents. The Court of Appeals misconstrued this argument, for it assumed that this argument meant that Section 1306(d) covered the *possession* of a forged alien registration receipt card. Respondent did not contend that Section 1306(d) covered the question of possession, but only used the argument that if a special section was created for the counterfeiting of alien registration receipt cards (8 U.S.C. 1306(d)), then that similar provision in Section 1546 was unnecessary. One or the other section was mere surplus. It is most difficult to understand that Congress in the same *Act* created a useless surplus provision for alien registration receipt cards. The principles of statutory construction are designed to save and not destroy legislation, and it is the

duty of the Court to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section. *United States v. Menasche*, 348 U.S. 538-539 (1955). The statute must be given a reasonable construction which gives effect to all of its provisions, and the Court should not adopt a strained reading which would render one part a mere redundancy. *Jarecki v. G. D. Searle and Co.*, 367 U.S. 303, 307-308 (1961). The Immigration and Nationality Act of 1952 should be construed to give effect to both sections (18 U.S.C. 1546 and 8 U.S.C. 1306), and this natural and essential consistency can be achieved by the simple recognition that the alien registration receipt card is not a document required for entry within the scope of 18 U.S.C. 1546. Also, the rule of construction that the specific will govern the general adds additional weight to the conclusion that the separate meaning of the specific section dealing with the counterfeiting of alien registration receipt cards (8 U.S.C. 1306(d)), must be given effect, and therefore, the alien registration receipt card should be recognized as distinct from the document required for entry (18 U.S.C. 1546).

Although there is no specific section dealing with the possession of an altered alien registration receipt card, the overall and comprehensive scheme of the Immigration and Nationality Act of 1952 did provide an appropriate section (Section 275) codified in 8 U.S.C. 1325 to cover the situation. That section provides that "Any alien who . . . (3) obtains entry into the United States by a wilfully false or misleading representation or the wilful concealment of a material fact" shall be subject to a criminal penalty for a first offense of not more than six months or a fine of not more than \$500, or both. The presence of Dimas Campos-Serrano in the United States and the possession of an altered card would give rise to a possible violation of 8 U.S.C. 1325. The use of a false or altered alien registration receipt card would be a possible manner in which a false representation was used to obtain entry. The thrust of the wrong done was the gaining access to the United States by

a false or fraudulent means, whereas the specific means is of secondary significance. The thrust of a violation under 18 U.S.C. 1546 is to prevent those seeking entry into the United States from using false documentation that would provide apparent legal status within the United States. There exists substantial overlap between these two statutory sections, but since there exists some ambiguity and confusion as to precise delineation intended by Congress, the principle of lenity should be applied. When faced with the determination of whether the alleged wrongful conduct constitutes a felony or a misdemeanor, the Court should adopt the construction that treats the conduct as a misdemeanor. Although the Bank Robbery Statute (18 U.S.C. 2113) could be construed to provide several and separate punishments, this Court in *Heflin v. United States*, 358 U.S. 415, 419 (1959), stated that the Court resolved an ambiguity in favor of lenity when required to determine the intent of Congress in the punishment of multiple aspects of the same criminal act. In *Ladner v. United States*, 358 U.S. 169 (1958), the Court announced that when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity would be resolved in favor of lenity. The Court specifically stated:

This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. 358 U.S. 169, 178.

The policy of lenity is applicable in this case where the document required for entry is not sufficiently described by the felony statute (18 U.S.C. 1546), but the circumstances are such that it could be characterized as a misdemeanor.⁸

⁸The INS still possesses administrative authority to have an illegal alien voluntarily returned to Mexico or subjected to deportation proceedings, which do not involve criminal proceedings.

Also, the Immigration and Nationality Act of 1952 should be reconciled so as to produce a symmetrical whole or comprehensive scheme and avoid nullifying specific sections. *Federal Power Commission v. Panhandler Co.*, 337 U.S. 498, 514 (1949).

In addition to the statutory framework supporting the interpretation that the alien registration receipt card is not within 18 U.S.C. 1546, the published administrative regulations of INS also support this contention. In the regulations providing for the registration and fingerprinting of aliens (8 C.F.R. 264.1 (January 1969)), there are two classifications of forms. In 8 C.F.R. 264.1(a), the prescribed *registration* forms, which include an Application for Status as a Permanent Resident (Form I-485), are enumerated in detail, and in 8 C.F.R. 264.1(b), the forms serving as *evidence of registration*, which included the Alien Registration Receipt Card (Form I-151), are set forth. Those registration forms which are applications that must be submitted to secure entry into the United States are probably protected by the penal sanctions of 18 U.S.C. 1546, but the certificates or cards issued in response and subsequent to the application form which serve as proof of evidence of residency already acquired cannot logically be called "documents required for entry."

Congress could have amended 18.U.S.C. 1546 to include alien registration receipt cards, but the specialized treatment given to the alien registration receipt cards in Title 8, including a specific section for the counterfeiting of such card, the overall general statutory scheme, the very evidentiary nature of the alien registration receipt card, leads to the unavoidable conclusion that it is not a document required for entry. In *McFarland v. United States*, 19 F.2d 807 (6th Cir. 1927), the Court was faced with the issue as to whether or not the statute applied to a given fact situation. That statute was narrowly construed and the conviction was reversed. The Court of Appeals held:

The words of the statute must be such as to leave no reasonable doubt as to the intention of the

Legislature, *United States v. Hartwell*, 6 Wall. 385, 18 L.Ed. 830; and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, *Harrison v. Vose*, 9 How. 372, 13 L.Ed. 179. 19 F.2d 807, 808.

This Court should be guided by the same reasoning which would hold that the indictment failed to state an offense and was jurisdictionally deficient. The defendant should have been charged with no more than a violation of 8 U.S.C. 1325, a misdemeanor, and the indictment should have been dismissed.⁹

⁹ Trial defense counsel was unaware of the unpublished opinion in *United States v. Fernandez-Gonzalez*, 64 C.R. 101 (N.D. Ill. 1964), that dismissed an indictment charging a violation of 18 U.S.C. 1546 for almost precisely the reasons now asserted by the respondent. In its thirty-five page answer to the motion to dismiss in the trial court, the Government inadvertently overlooked this opinion, but did include it as an appendix to its brief in the Court of Appeals. The respondent includes it as a Special Appendix to this brief. The substance of the holding is referred to in *Fernandez-Gonzalez v. Immigration and Naturalization Service*, 347 F.2d 737, 739 (7th Cir. 1965).

IV

IN SUPPORT OF THE JUDGMENT OF THE COURT BELOW THE RESPONDENT URGES THE VIOLATION OF THE FOURTH AMENDMENT RIGHT AGAINST UNLAWFUL SEARCH AND SEIZURE, THE SIXTH AMENDMENT IN DEFENDANT'S DENIAL OF CONFRONTATION OF THE WITNESSES AGAINST HIM, AND THE FIFTH AND SIXTH AMENDMENT DENIALS OF SUFFICIENT FUNDS TO SECURE THE ATTENDANCE OF NECESSARY MATERIAL WITNESSES AS GROUNDS FOR THE REVERSAL OF THE CRIMINAL CONVICTION.¹⁰

A. The Interrogation of the Defendant and the Products of That Interrogation Were the Result of an Unlawful Search and Seizure, in Violation of the Fourth Amendment.¹¹

On the second entry into the apartment an agent, who had previously been in the defendant's apartment and had examined his alien registration receipt card, demanded the card. The stated purpose of the entry was to accompany their prisoner Rodriguez-Ortis for the purpose of collecting his clothing and personal belongings. The record fails to state any clear manifestation of consent on the part of the prisoner Rodriguez-Ortis to the entry into the apartment, and the defendant Campos-Serrano denied that he gave such consent. (App. 63)

The protection of the Fourth Amendment against unlawful search and seizure is no longer restricted to places, but affords protection to *people*. *Katz v. United States*, 389 U.S. 347, 351 (1967). In this case there was neither an arrest warrant for the defendant or for Rico or for Ortiz, and

¹⁰These three grounds presented to the Court of Appeals were not reached because of the action taken on the issue involving the privilege against self-incrimination.

¹¹It appears that a similar contention was raised, but not reached in *Orozco v. Texas*, 394 U.S. 324, 325 (1969).

there was also no search warrant. It is important to note that the series of arrests had been planned a day in advance when adequate opportunity would have existed to obtain arrest warrants for those suspects who were to be seized the following day. The entry into the apartments for both the first and second time is grounded upon the implied consent given by the prisoner, who was allegedly seeking to retrieve his clothing. The second entrance was based upon the consent of the prisoner Ortiz, for such consent must be implied by virtue of his production of a key and opening a door to the apartment. The record, at most, sets forth a very ambiguous and uncertain type of consent on the part of the prisoner Ortiz. Defendant's counsel was denied the opportunity to examine the prisoners Rico or Ortiz or to produce them on behalf of the defendant on the issue of whether or not there was valid consent, because the Government (INS) had returned these witnesses to Mexico before they could be interviewed by defense counsel. The justification of the search of the defendant's apartment must be founded upon the alleged implied-in-law consent, if any can be said to exist, granted by the defendant Ortiz who was accompanied by the INS investigators into his apartment while he gathered his personal belongings. This record does not provide the sufficient factual statement to show any lawful consent by this prisoner or the circumstances. In *Bumper v. North Carolina*, 391 U.S. 543 (1968), this Court held:

When the prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing *no more than acquiescence to a claim of lawful authority*. 391 U.S. 543, 548-549 (Emphasis added).

The evidence in this record has not discharged that constitutional responsibility.

Assuming arguendo that some form of consent has been given, the activity of Investigator Burrow, who had been previously in the apartment and had previously examined

the alien registration receipt card of the defendant, transcended the limits of any implied consent to enter for the purpose of retrieving the personal belongings of Ortiz. When Investigator Burrow commenced his interogation of the defendant upon the suspicion that the defendant might also possess an altered alien registration receipt card, he exceeded his authority of the consent allegedly granted by Ortiz and transgressed on the zone of privacy that protected the defendant in his own apartment.

Since the prisoner Ortiz could not be examined, circumstances surrounding the procedure by which the INS agents permitted the apprehended prisoners to return to their apartment to obtain personal belongings could not be subject to searching inquiry. However, the Court should not be unmindful of various stratagems developed by law enforcement officers to avoid judicial processes. Such Federal agents through the apparent "generous" permission granted to the prisoners to return to their apartment for their personal belongings reaped the unwarranted advantage or expedient of gaining access to living quarters without resort to judicial process for a warrant. This Court has repeatedly held that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, and that the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Chimel v. California*, 395 U.S. 752, 762 (1969); *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). The inter-relationship of the Fourth and Fifth Amendments has been previously recognized by this Court. *Boyd v. United States*, 116 U.S. 616, 633 (1886), and *Davis v. United States*, 328 U.S. 582 (1946). In the *Davis* case the Court emphasized that the searched or compelled production had occurred at a place of business, and on that basis distinguished the case of *Amos v. United States*, 255 U.S. 313 (1921), which involved a search of a private residence. 328 U.S. 582, 592-593. The *Davis* case in this context would not permit the overreaching of the Federal agents in this case.

The defendant Campos-Serrano was entitled to a zone of privacy in his own apartment, and the conduct of the INS investigators clearly transcended it by their lack of a consensual entry and their failure to adhere to the limited scope of that entry. The card and any conversation of the defendant connected with the card should have been suppressed as a violation of the Fourth Amendment.

B. The Introduction into Evidence of an Immigration File With a Third Party Statement Was Inadmissible Hearsay and Denied the Defendant the Right to Confront the Witnesses Against Him Under the Sixth Amendment.

Over the objection of the defense, the Court admitted into evidence the application of Miss Vargas-Garcia for a new alien registration card and her statement that her card with number A14 713 099 was stolen. This evidence established that the card in issue was an authentic card, but it had been altered.

The Government introduced the file of Miss Vargas-Garcia without any foundation other than the fact that the record was certified by the INS District Director. The Government relied upon the statutory authority of the Attorney General to delegate duties to carry out the provisions of the laws relating to immigration and naturalization (8 U.S.C. 1103) and administrative regulations authorizing the District Director to certify records (8 C.F.R. 103.10(d)(ii)). Although this statute and implementing regulation might have been valid to certify records for civil and administrative proceedings, this procedure could not justify the introduction into evidence of such hearsay statements in a criminal proceeding involving a felony. To do so would violate the defendant's right to confront the witnesses against him protected by the Sixth Amendment and would be inconsistent with existing federal law as to the hearsay exception for public records.

The revised draft of the proposed *Rules of Evidence for the United States District Court and Magistrates*, 51 F.R.D. 315 (1971), sets forth an exception to the hearsay rule for public records and reports of public officials or agencies when the entry contains a report of activities of the official or agency or matters observed pursuant to a duty imposed by law. Factual findings resulting from an investigation can be used in criminal cases *only against the Government*, for otherwise there would be a collision with the confrontation rights of the accused in a criminal case. See Rule 803(8), 51 F.R.D. 315, 420 (1971).

A leading federal case, *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954), holds that all documents prepared by officials pursuant to a duty imposed by law or required by the nature of their offices are admissible as proof of the facts stated therein with the proviso that the facts stated in the document must have been within the personal knowledge and observation of the reporting official or his subordinates. 210 F.2d 795, 801. See also *Yaich v. United States*, 283 F.2d 613, 616 (9th Cir. 1960). The statement in the instant case is not that of the public official, but that of Miss Vargas-Garcia.

Also the unwarranted extension and abuse by the Government of the "public records" exception to the hearsay rule in using their records to otherwise present a hearsay statement of a third party witness was best criticized by the remarks of Chief Judge Denam in a civil case in *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952), which held:

An absurdity would arise from application of the appellee's theory. Thus, in a trial on the charge of murder against John Smith, the testimony of William Henry, given in a hearing of the National Labor Relations Board, that Smith was the enemy of the murdered man would be admissible even though Henry were an available witness. 196 F.2d 120, 123.

The Government's failure to make any showing of the unavailability of Miss Vargas-Garcia is the very crux of the

case. In *Barber v. Page*, 390 U.S. 719 (1968), this Court held that the primary object of the Confrontation Clause of the Sixth Amendment was to prevent the use of *ex parte* affidavits in lieu of a personal examination and cross-examination of the witness in which the accused had an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the trier of fact. The Court had reason to use its earlier decision in *Mattox v. United States*, 156 U.S. 237 (1895), where an exception was created on the principle of necessity. There a witness who had testified at an original trial had died prior to the second trial. In *Mattox* necessity was shown, and the prior testimony was admissible. In *Barber*, no necessity was shown nor was good faith effort made to locate the witness, and the transcript of the preliminary hearing was held to be inadmissible.

In more recent cases this Court has dealt with the applicability of the Confrontation Clause to state proceedings. *California v. Green*, 399 U.S. 149 (1970), *Dutton v. Evans*, 400 U.S. 74 (1970). Under either the right of confrontation protected by the Sixth Amendment or under the Court's general supervisory power, this record should not have been admitted without a showing of unavailability of the witness.

C. The Failure to Provide Funds to Secure the Attendance of Two Necessary and Material Witnesses Was a Denial of Due Process Under the Fifth Amendment and a Denial of the Effective Assistance of Counsel Under the Sixth Amendment.

Prior to the trial, the defendant filed a motion to dismiss the indictment asserting, as one of the grounds, the prejudicial delay in the return of the indictment which denied the defendant access to certain material witnesses, Rico and Ortiz, who had been arrested with the defendant, but deported to Mexico prior to their examination by defense

counsel. (App. 11). During the hearing on the motion to suppress, when the INS agents testified as to the search of the defendant's apartment by virtue of the consent given by Ortiz and Rico, defense counsel moved that the testimony concerning consent be struck, or in the alternative, that the defendant be given an opportunity to try and locate these particular witnesses so that they could be brought into court to testify on the issue of consent, for otherwise the defendant's constitutional right of confrontation of the witnesses against him would be violated. (App. 35, 73). The objection to the testimony of the agents was overruled, and the motion for funds to locate the witnesses was denied. (App. 35).

The two prisoners were not nationals or residents of the United States, and, therefore, could not be reached with a subpoena. 28 U.S.C. 1783. However, under the equal protection requirements of the due process clause of the Fifth Amendment (*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)), the defendant should have been given the opportunity to seek the attendance of these witnesses, especially Ortiz concerning the second entry, as the fair equivalent of compulsory process of witnesses. These witnesses would be necessary to insure adequate cross-examination of the INS agents, for since the INS agents were certainly aware of the absence of these aliens, they knew their testimony would go uncontradicted.

The defendant was arrested on 19 November 1968, and his first court appearance with counsel was 16 December 1968. On 12 December 1968 Ortiz entered a plea of guilty and was given three years probation with a recommendation that he be returned to Mexico (Record in Court of Appeals 59). If defense counsel had been appointed prior to 12 December 1968, he would have had an opportunity at this "critical stage" of the criminal proceeding to secure the testimony of the essential witnesses. There was no preliminary hearing on appearance before the United States Commissioner (App. 72), and this delay in bringing the defend-

ant before a judicial officer denied him the opportunity to secure testimony of witnesses on the vital aspects concerning the entry of INS agents into his apartment.

This prejudicial delay precluded the effective defense presentation on the issue of the suppression of evidence, and since the trial court denied any opportunity to secure the testimony of these witnesses who might have aided the impecunious defendant, this Court should sustain the reversal of the criminal conviction.

CONCLUSION

For the reasons set forth above, Dimas Campos-Serrano, the respondent, through his attorney requests that the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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Federal Defenders of
San Diego, Inc.
Attorney for Respondent

Assisted by:

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University of Arkansas School
of Law

Dated: July 1971

* Under a federal grant to the National Legal Aid and Defender Association, Mr. Goss was selected to serve a practical legal internship with the community defender organization for the United States District Court for the Southern District of California. In this capacity he assisted counsel in the preparation of this brief.

SPECIAL APPENDIX TO RESPONDENT'S BRIEF

IN THE UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

UNITED STATES OF AMERICA

Plaintiff;

vs.

ENRIQUE

FERNANDEZ-GONZALES,

*Defendant.**Findings Of Fact**and**Conslusions Of Law.*

64 CR 101

TRANSCRIPT OF PROCEEDINGS

before

HON. MICHAEL L. IGOE

Judge

Everett H. Hughes
Official Court Reporter
United States District Court
United States Courthouse
Chicago, Illinois 60604
Webster 9-2829

This cause coming up for trial before this Court on the indictment charging the defendant with the violation of Section 1546, Title 18, of the United States Code, and the defendant having waived trial by jury and having signed a jury waiver which was theréupon approved, and the evidence in this cause having thereupon been submitted to the Court on an agreed statement of the facts and both sides thereupon resting, comes the defendant and presents his motion to find him not guilty on the ground that the indictment fails to charge any offense within the purview of said Section 1546 and that the evidence fails to establish beyond a reasonable doubt the guilt of the defendant of any offense cognizable by said Section 1546, Title 18, of the United States Code.

and the Court having heard argument in open court by the respective counsel for both sides, and now being fully advised in the premises, upon due consideration thereof, Finds:

FINDING OF FACTS

The defendant is a native and citizen of Mexico. He entered the United States at Chicago, Illinois, on or about November 14, 1962, as a non-immigrant visitor for pleasure, authorized to remain in the United States until February 14, 1963. He has remained without authority since the latter date. In the proceedings before a special inquiry officer of the Immigration and Naturalization Service, at Chicago, Illinois, on an Order to Show Cause, the defendant conceded that he was subject to deportation on the charge contained in the Order to Show Cause, to wit: Of having entered as a non-immigrant and remained beyond the date authorized by his non-immigrant visa. The defendant's application for voluntary departure from the United States at his own expense in lieu of deportation was denied by the Immigration Service. Neither the defendant's deportation nor the denial of his application for voluntary departure in lieu of deportation is in any way involved in the instant proceedings.

In December of 1962 the defendant, on the advice of a boy working with him in a meat market in Chicago where he was employed, wrote to one Oscar Rodriguez in Nuevo Laredo, Mexico, asking him what it would cost to fix his papers so that he could stay in the United States permanently and, after receiving a reply, sent to said Oscar Rodriguez the sum of One Hundred (\$100.00) Dollars, together with two photographs of himself and his passport. Some twelve days later the defendant's passport was returned to him with the alien registration receipt card bearing No. A8-536-766 in the name of Francisco Ochoa Cazares and with defendant's photograph affixed to the back. The defendant wrote back to Oscar Rodriguez that he could not use this card because it was not in his name and did not have his correct birth date, but the letter was returned to him and he never heard from Oscar Rodriguez again.

Following receipt of the said alien registration card, the defendant obtained a social security card in the name of Francisco Ochoa Cazares and exhibited the alien registration card and the social security card to his employer, Acme Specialties Corporation.

It is this alien registration card which is the basis for the indictment of the defendant for violating Section 1546, Title 18, United States Code. The indictment consists of three counts. In the first count the defendant is charged in effect with wilfully and knowingly having the offending alien registration card in his possession, in violation of Section 1546, Title 18, United States Code. In the second count, the defendant is charged with unlawfully using a fraudulent alien registration card by presenting same to Acme Specialties Corporation, River Grove, Illinois, to obtain employment, knowing same to have been falsely altered, in violation of Section 1546, Title 18, United States Code. In the third count, the defendant is charged in effect with having obtained, received and accepted the offending alien registration card, knowing same to have been fraudulently altered for the purpose of falsely claiming to be a non-quota immigrant when he knew that as a native of Mexico he was a quota immigrant and as such not entitled to remain in the United States beyond the period allowed by law on a visitor status, all in violation of Section 1546, Title 18, United States Code.

CONCLUSIONS OF LAW

Section 1546, Title 18, United States Code, does not appear, upon a careful reading, to deal with alien registration receipt cards. This section, as amended June 27, 1952, is entitled "Fraud and misuse of visas, permits, and other entry documents", and the first paragraph thereof (the only one which could possibly apply to the offense charged in the indictment) reads as follows:

"S 1546. Fraud and misuse of visas, permits, and other entry documents.

Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or non-immigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained: . . .

* * *
* * *
* * *

Shall be fined not more than \$2,000 or imprisoned not more than five years, or both. As amended June 27, 1952."

An alien registration receipt card is not a visa, permit, or other document required for entry into the United States. It is a document which is issued to an alien after his entry into the United States but never before his entry.

The registration of aliens and the issuance of alien registration cards is governed by Sections 1301, et seq., of Title 8 of United States Code, the Immigration and Naturalization Act of 1952. Section 1302 of said Title 8 provides, so far as is pertinent, as follows:

"S 1302. Registration of Aliens.

(a) It shall be the duty of every alien now or hereafter in the United States, who, (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under Section 1201, (b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Section 1304 of the Immigration and Naturalization Act of 1952, in paragraph (d) thereof, provides as follows:

"Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General."

Section 1306 of said Title 8 of the United States Code, in sub-paragraphs (a), (b), (c), and (d), provides penalties for the violation of the Alien Registration Act and imposes severe penalties for the alteration or forgery of an alien registration receipt card.

It will be noted that the Immigration and Naturalization Act, of which the alien registration provisions are a part, and Section 1546, as amended, of Title 18, United States Code, were adopted by the Congress of the United States on the same day, to wit: June 27, 1952. There is no reason to believe, then, that Congress intended Section 1546 of Title 18, dealing with visas, permits, and other entry documents, to cover alien registration cards as well, since it adopted at the same time separate and express provisions to deal with such alien registration cards. It is clear that an alien registration card is issued to an alien after he has entered the United States and is merely an acknowledgment or certification of his having entered.

It follows as a matter of law that an offense with respect to an alien registration card cannot constitute a violation of Section 1546 of Title 18, United States Code. Every federal prosecution must be sustained by statutory authority. The instant prosecution, bottomed by the Government on the inapplicable provisions of Section 1546 of Title 18, must therefore fail.

Having reached this conclusion, the other points made by the defendant in support of his motion to find him not guilty need not be considered.

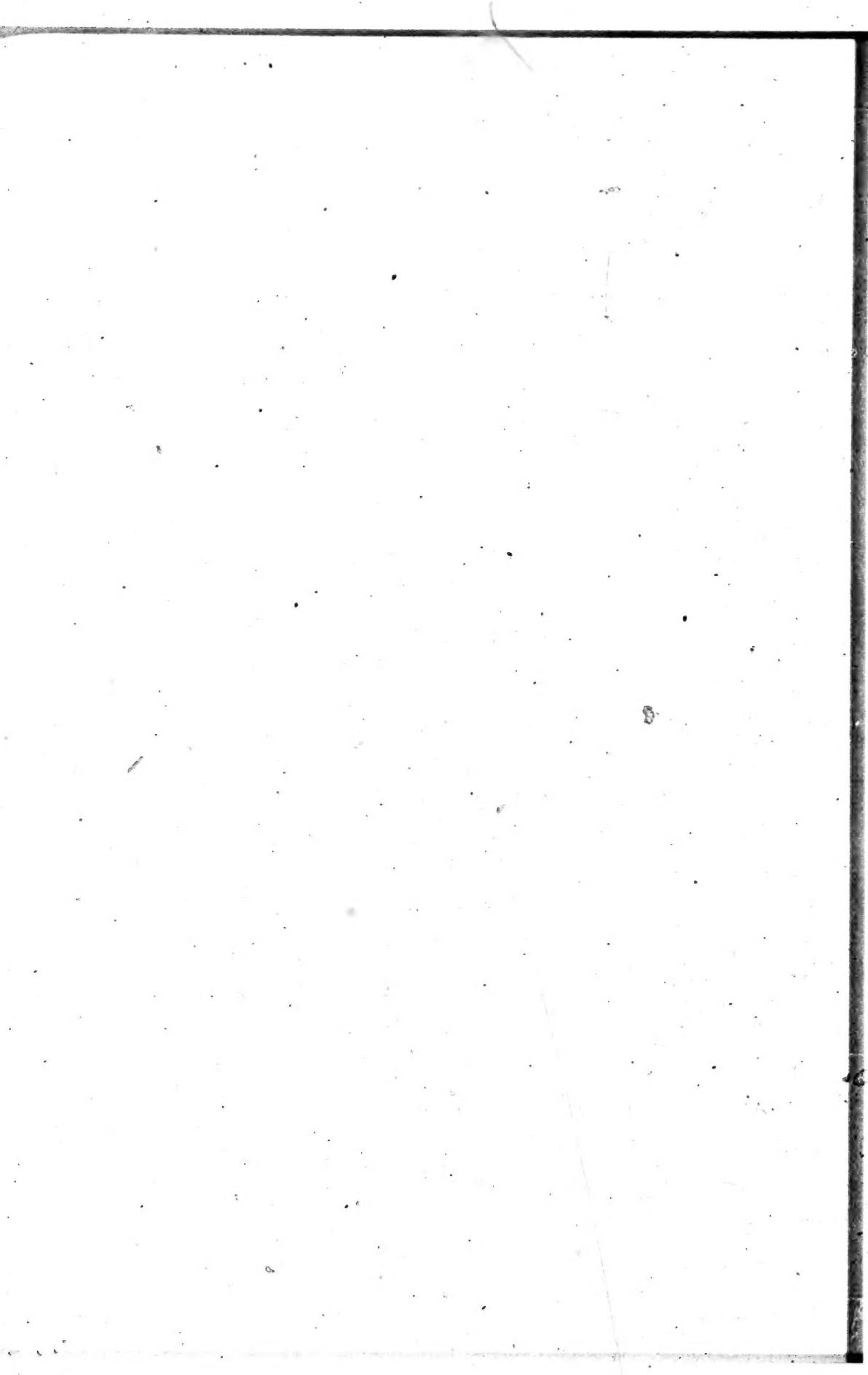
It Is Therefore Ordered that defendant's motion to find him not guilty, made after both sides have rested, by and the same is hereby allowed.

It Is Further Ordered that the defendant be and he is hereby found not guilty of the charges made against him in all three counts of the indictment.

The defendant is accordingly discharged.

Enter:

/s/ M. L. Igoe
Judge.



INDEX

	Page
I. The indictment charges an offense under 18 U.S.C. 1546	3
II. The Immigration and Naturalization Service file of another alien, whose registration receipt card was the one that respondent possessed, was properly admitted into evidence	13
III. Respondent's production of his alien registration receipt card on request did not constitute an unreasonable seizure of evidence in violation of the Fourth Amendment	16
IV. There was no violation of due process resulting from the inability of respondent to interview witnesses who had been deported	18
Conclusion	20

CITATIONS

Cases:

<i>Brown v. United States</i> , 375 F. 2d 310, certiorari denied, 388 U.S. 915	17
<i>Bumper v. North Carolina</i> , 391 U.S. 543	17
<i>California v. Byers</i> , 402 U.S. 424	2
<i>Davis v. United States</i> , 328 U.S. 582	17
<i>Dutton v. Evans</i> , 400 U.S. 74	15
<i>Kay v. United States</i> , 255 F. 2d 476	15
<i>Langnes v. Green</i> , 282 U.S. 531	1
<i>Lau Ow Bew v. United States</i> , 144 U.S. 47	12
<i>Maroon v. Immigration and Naturalization Service</i> , 364 F. 2d 982	14
<i>McFarland v. United States</i> , 19 F. 2d 807	13
<i>Smith and Bowden v. United States</i> , 324 F. 2d 879, certiorari denied, 377 U.S. 954	17
<i>United States v. Holmes</i> , 387 F. 2d 781, certiorari denied, 391 U.S. 936	14
<i>United States v. Leathers</i> , 135 F. 2d 507	15
<i>United States v. Lloyd</i> , 431 F. 6d 160, certiorari denied, 403 U.S. 911	14

Cases—Continued

	Page
<i>United States v. Montez-Hernandez</i> , 291 F. Supp. 712	17
<i>United States v. Mouyas</i> , 42 F. 2d 743	9, 13
<i>United States v. Perlman</i> , 430 F. 2d 22, certiorari denied, 400 U.S. 832	20
<i>United States v. Rodriguez</i> , 182 F. Supp. 479, reversed in part on other grounds, 288 F. 2d 545, certiorari denied, <i>sub nom. Rocha et al. v. United States</i> , 366 U.S. 948	6
<i>United States v. Sacco</i> , 428 F. 2d 264, certiorari denied, 400 U.S. 903	14
<i>United States v. Wolfson</i> , 322 F. Supp. 798	18
<i>United States ex rel. Polymeris v. Trudell</i> , 284 U.S. 279	9
<i>Wong Sun v. United States</i> , 371 U.S. 471	17
<i>Worthy v. United States</i> , 328 F. 2d 386	8
Constitution and statutes:	
U.S. Constitution:	
Fourth Amendment	16
Fifth Amendment	2, 3
Sixth Amendment	9, 14
Alien Registration Act, 1940, 54 Stat. 670, <i>et seq.</i> :	
54 Stat. 673	4, 5
18 U.S.C. (1964 ed.) 1546	1, 3, 4, 5, 6, 9, 10, 11, 13
28 U.S.C. 1733	14
Immigration Act of 1924, 43 Stat. 153, <i>et seq.</i> :	
Section 22(a), 43 Stat. 165 (then 8 U.S.C. (1940 ed.) 220)	4, 5
43 Stat. 158	4
43 Stat. 159	4
43 Stat. 169	4
Immigration Act of 1952, 66 Stat. 163 <i>et seq.</i> :	
Section 101(a)(6) (now 8 U.S.C. (1964 ed.) 1101(a)(6))	8
Section 101(a)(13) (66 Stat. 167, now 8 U.S.C. 1101(a)(13))	7, 8, 14
Section 211(b) (8 U.S.C. 1181(b))	8
Section 223 (now 8 U.S.C. 1203)	8
Section 266(d) (66 Stat. 226, now 8 U.S.C. 1306(d))	9, 10, 11, 12
Section 275 (8 U.S.C. 1325)	12

Constitution and statutes—Continued

	Page
Immigration Act of 1952, 66 Stat. 163 <i>et seq.</i> —Con.	
Section 287(a) (8 U.S.C. 1357(a))-----	12
Section 402(a)-----	5
66 Stat. 683-----	6
62 Stat. 771-----	6
66 Stat. 772-----	6
Rules and regulations:	
Rule 17(b), Fed. R. Crim. P-----	18
Rule 27, Fed. R. Crim. P-----	14
Rule 44(a), Fed. R. Civ. P-----	14
17 Fed. Reg. 4921-4922 (May 29, 1952)-----	5, 11
22 Fed. Reg. 6377 (currently 8 C.F.R. 211.1(b), as amended)-----	5
8 C.F.R. 103.7-----	14
8 C.F.R. 211.1(b)-----	8
8 C.F.R. 264.1(c)-----	15
Miscellaneous:	
H. Rep. No. 1365, 86d Cong., 2d Sess-----	6
S. Rep. No. 1137, 86d Cong., 2d Sess-----	6
S. Rep. No. 1515, 81st Cong. 2d Sess-----	6, 9, 13
Conf. Rep. No. 2096, 82d Cong., 2d Sess-----	6

In the Supreme Court of the United States

OCTOBER TERM, 1971

—
No. 70-46

UNITED STATES OF AMERICA, PETITIONER

v.

DIMAS CAMPOS-SERRANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

This reply brief is deemed necessary because respondent has raised a number of issues in his answering brief that were not presented to this Court in the government's petition for a writ of certiorari¹ and, with but one exception,² were not decided by the court of appeals. For the reasons set forth below, we believe

¹ Respondent did present the additional arguments in a "Conditional Cross-Petition" (No. 70-46, October Term 1971), which was filed out of time under Rule 22(2) of the Rules of this Court. This Court has not as yet acted on the cross-petition. We do not suggest that the matters are not properly before the Court. *Langnes v. Green*, 282 U.S. 531.

² Respondent's contention that the indictment failed to charge an offense under 18 U.S.C. 1546 was fully considered and rejected by the court below (App. 124-126).

that each of these additional arguments is insubstantial, and that this Court, if it agrees with the position we take in our opening brief, can appropriately reverse the judgment of the court of appeals and reinstate the judgment of conviction.

Before we discuss these new issues, we refer briefly to the recent decision in *California v. Byers*, 402 U.S. 424, decided after the filing of our initial brief in the present case. *Byers* involved the validity, as against a claim of Fifth Amendment privilege, of a state "hit and run" statute, requiring the driver of a motor vehicle, if involved in an accident, to stop and furnish his name and address. Although the case dealt with a compulsory-reporting statute, rather than, as here, with production of a registration card that the law requires all registered aliens to keep in their possession, five members of the Court employed a similar analysis to the one we have suggested in our initial brief for resolving the "required records" issue in this case.

Both the plurality opinion of the Court and the separate opinion of Mr. Justice Harlan, although differing in other respects, accept the proposition we urge here that, in judging the validity under the Fifth Amendment self-incrimination clause of a reporting or record-keeping scheme, the critical inquiry is whether that scheme is directed at a class of persons inherently suspect of criminal activities (402 U.S. at 428-431; *id.* at 454-458 (Harlan, J., concurring)). If that element is missing, and instead it is shown that the reporting or record-keeping scheme serves a valid,

non-criminal, public purpose—as five members of the Court found in *Byers*—then the fact that a particular individual within the class might be called upon to furnish information that would incriminate him does not alone furnish the basis for a successful assertion of a claim of Fifth Amendment privilege (402 U.S. 430-431; *id.* at 438-439, 457 n. 9 (Harlan, J., concurring)).

Similar reasoning, we submit, warrants an application of the “required records” doctrine in the present context. We have fully developed the argument in our opening brief and can find nothing in respondent’s answer thereto that requires further discussion of the points that we have already made. We turn, then, to the new issues that respondent has raised.

I. THE INDICTMENT CHARGES AN OFFENSE UNDER 18 U.S.C.

1546

Respondent contends that the indictment fails to charge an offense under 18 U.S.C. (1964 ed.) 1546. That provision provides in relevant part:

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made * * * [shall be guilty of a felony].

It is argued that an alien registration card is not covered by the statutory language because it is not a “document required for entry into the United States,”

but rather is issued only after initial entry of an alien admitted for permanent residence and thus can only be used for purposes of "reentry." Respondent moved before trial to dismiss the indictment on this ground (App. 10-12), and the motion was denied. In the court of appeals, he again argued for a construction of 18 U.S.C. 1546 that would not include alien registration cards; the argument was fully considered by the court below and rejected (App. 124-126). Both the statutory language and its legislative history support that result.

1. The predecessor to Section 1546 was Section 22 (a) of the Immigration Act of 1924, 43 Stat. 165. That section differed from the provision here in question only insofar as it related to a narrower category of documents, that is, "any immigration visa or permit," as compared with the present "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States." Under the earlier language, Congress had explicitly included within the definition of "permit" (43 Stat. 169) a document known as a temporary reentry permit, used to facilitate the departure and return of aliens who wished to leave the country for a period of less than one year; this temporary permit was to be surrendered upon the aliens' return (43 Stat. 158, 159). Thus, as early as 1924, the statutory scheme contemplated that knowing possession of an altered "permit," useful only for purposes of reentering the United States, was punishable as a felony.

The alien registration receipt card was not issued until 1941. It was authorized under the Alien Registration

Act of 1940, which established a registration requirement for aliens residing in this country. Initially, the cards could not be used to facilitate reentry of resident aliens who departed the United States, but had the sole function of identifying those aliens who had complied with the registration requirements of the Act. See 54 Stat. 673, *et seq.* For reentry purposes, the 1940 Act authorized use of a separate document, denominated a "border crossing identification card," which enabled resident aliens to return to this country after temporary travel to a contiguous nation. 54 Stat. 673.

On May 29, 1952, an Immigration and Naturalization Service regulation (17 Fed. Reg. 4921-4922) was promulgated to provide that the alien registration receipt card, if issued after September 10, 1946, would henceforth serve as a resident alien border-crossing identification card and could be used in effecting a reentry into the United States from a contiguous country. This marked the first time that alien registration receipt cards were recognized as entry documents. Their function in this regard has continued to the present, and, in 1957, it was expanded to include reentry by resident aliens into the United States from other than contiguous nations. 22 Fed. Reg. 6377 (currently 8 C.F.R. 211.1(b), as amended).

On June 27, 1952, Congress amended Section 1546 to its present form in Section 402(a) of the comprehensive Immigration Act of 1952.³ As noted above,

³ In 1948, Section 22(a) of the Immigration Act of 1924 (then 8 U.S.C. (1940 ed.) 220) had been repealed as part of a general recodification of the criminal laws, and then reenacted in modified form, with no pertinent substantive change, as Section

the amendment, which was largely unexplained in the various committee reports,⁴ substituted the phrase, "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States," for the more limited language of "any immigrant visa or permit."

As the court of appeals found (App. 125), Congress, in redefining the category of documents within the prohibition of 18 U.S.C. 1546, was "expanding," rather than narrowing, the class of entry documents that could be reached. See also *United States v. Rodriguez*, 182 F. Supp. 479, 484 n. 3 (S.D. Cal.), reversed in part on other grounds, 288 F. 2d 545 (C.A. 9), certiorari denied *sub nom.*, *Rocha et al. v. United States*, 366 U.S. 948. Since 1924, the earlier language had specifically included a "permit" utilized only

1546 of Title 18, United States Code. See 62 Stat. 683, 771-772, 865. Until 1952, the provision contained the same basic phrase, "any immigration visa or permit" found in the 1924 Act.

⁴ See H. Rep. No. 1365, 82d Cong., 2d Sess.; S. Rep. No. 1137, 82d Cong., 2d Sess.; Conf. Rep. No. 2096, 82d Cong., 2d Sess.; S. Rep. No. 1515, 81st Cong., 2d Sess.

⁵ While it does not appear from the various committee reports (*supra* n. 4) that the adoption of this broader language was in direct response to the newly-promulgated regulation authorizing use of alien registration receipt cards as entry documents, it seems apparent as the opinion in *Rodriguez* points out, that Congress did intend, by adding the phrase "other document required for entry," to reach documents, such as passports, alien border-crossing identification cards, and the like, which simply did not fit the prior statutory class of "immigration visa or permit." The fact that Congress may not have focused at the time that the Act was passed on a particular document recently authorized for use in obtaining lawful entry into this country would not remove that document from the purview of the section any more than it would exclude such a document if created now by legislation or regulation.

for gaining reentry after temporary absence in a contiguous country; nothing in the additional phrase, "document required for entry into the United States," suggests a legislative intent suddenly to confine the scope of the section to documents of the type utilized only in making an initial entry.

On the contrary, the new language evinces a clear congressional intent to enlarge the coverage of Section 1546 to all documents of the type designated by law (then and in the future) as useful to aliens in effecting any entry, whether initially or after temporary absence from this country, into the United States. Indeed, the statutory definition of the term "entry," set forth in Section 101(a)(13) of the same Act (66 Stat. 167; now 8 U.S.C. 1101(a)(13)), makes this clear. It states:

The term "entry means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise; except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: * * *.

Since Congress defined "entry" to include reentry by a resident alien, subject only to certain narrow exceptions for unintentional or involuntary depar-

tures, it plainly meant by use of the phrase, "document required for entry," to encompass documents useful in effecting reentry into the United States.⁶ Section 101(a)(6) of the 1952 Act (now 8 U.S.C. 1101(a)(6)) specifically recognizes and defines the border-crossing identification card as one kind of reentry document issued to aliens admitted for permanent residence. In addition, Section 223 of the Act (now 8 U.S.C. 1203) recognizes another variety of reentry document that may be issued to permanent resident aliens—a reentry permit. It is difficult to believe that Congress did not intend the possession of these documents, if known to be forged, counterfeited, altered or falsely made, to come within the ambit of Section 1546 merely because they are not used by an alien for purposes of initial entry into the United States. Nor is there any more reason for making such an assumption with respect to the alien registration receipt card, which is explicitly recognized by regulation (8 C.F.R. 211.1(b)) as a permissible document for gaining entrance into the United States "in lieu of an immigrant visa or reentry permit" after a temporary absence of not more than one year.

⁶ Respondent quite properly did not premise his argument to the contrary on the meaning of the term "required" in the statute. A literal reading of that term would necessitate excluding virtually every document used for entry purposes, since no immigration document is absolutely essential for alien admission into the United States. For example, citizens have a constitutional right to return to the United States even without a passport or other document. See *Worthy v. United States*, 328 F. 2d 386, 394 (C.A. 5). Similarly, the Attorney General

2. Respondent points, however, to the specific reference to alien registration receipt cards in Section 266(d) of the same 1952 Act that contains Section 1546 as ground for construing the latter provision so as not to include such reentry documents. Section 266(d) provides in pertinent part (66 Stat. 226):

Any person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration, or an alien registration receipt card, or any colorable imitation thereof, except when and as authorized * * * by the

is authorized by statute to readmit returning resident aliens without any documentation. See 8 U.S.C. 1181(b).

Moreover, a passport was held to be within the purview of the predecessor to Section 1546 in *United States v. Mouyas*, 42 F. 2d 743 (S.D.N.Y.), which involved a separate offense of "personating" another. The provision at issue in *Mouyas* was carried forward in the 1952 Act as paragraph 3 of Section 1546, and the language of that paragraph was also changed to add the phrase "other document required for entry into the United States," so as to parallel the phraseology in paragraph 1 of the same Section. Since the purpose of the additional phrase was to expand the section to entry documents other than visas or permits, it seems clear that the phrase "document required for entry" includes a passport. See S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 647-648.

In view of the foregoing, use of the word "required" in Section 1546 must be read to refer to documents of the kind designated for use in seeking entry into the United States, or, in the words of *Mouyas* describing the nature of a passport, a "usual and permissible type of document for presentation at the time of seeking admission" (42 F. 2d at 745). So construed, the language in question plainly includes an alien registration receipt card, which has been designated as a permissible kind of entry document to be used by returning resident aliens. Cf. *United States ex rel. Polymeris v. Teadell*, 284 U.S. 279.

Attorney General * * * [shall be guilty of a felony].

It is argued that, since Congress clearly was aware of alien registration receipt cards at the time of the 1952 Act, and acted specifically to make the counterfeiting of them a felony, Congress should not now be deemed simultaneously to have included such cards within the scope of Section 1546, which also punishes counterfeiting (as well as the knowing possession or alteration, of documents required for entry), thereby creating some overlap in coverage.⁸ That argument, however, overlooks the fact that the two sections are designed to deal with quite distinct problems. Section 266(d) was intended to implement and protect the alien registration scheme in Chapter 7 of the 1952 Act by punishing the counterfeiting of alien registration receipt cards. Section 1546 of the Act, as amended, on the other hand, was intended to safeguard the interest of the United States in the integrity of documents designated by law as appropriate for use in effecting entry into this country.

Assuming, as respondent contends, that Congress was aware at the time that it enacted the comprehensive 1952 Act that alien registration receipt cards had less than one month earlier been given by regulation

⁸ The Section is presently codified as 8 U.S.C. 1306(d); under the heading "Counterfeiting"; it was enacted in Chapter 7 of the 1952 Act dealing with "Registration of Aliens."

⁹ Both sections provide an imprisonment penalty of up to five years for a violation; Section 266(d) provides for an additional fine of up to \$5,000, whereas Section 1546 permits an additional fine of only \$2,000.

(17 Fed. Reg. 4921-4922, May 29, 1952) for the first time an "entry" function, in addition to their traditional function of evidencing registration, it is not unreasonable to conclude that Congress intended that they be included within the scope of *both* sections of the 1952 Act, notwithstanding the overlap in coverage as to counterfeiting. Section 1546, unlike Section 266(d), reaches activity other than counterfeiting; it proscribes in addition (1) the possession of entry documents known to have been forged or counterfeited,¹⁰ and (2) the alteration of such documents. A con-

⁹ It is not at all clear that Congress had such knowledge. The broader language in amended Section 1546 appears in the several relevant committee reports that antedated by some months the new regulation (see p. 5 and n. 4, *supra*). It is, therefore, quite possible that the overlap in coverage as to counterfeiting may be explained in part by the fact that the legislature, at the time it enacted the 1952 Act, did not focus on the administrative change giving alien registration receipt cards an additional function as entry documents. This, of course, would not mean that such cards are outside the scope of Section 1546; Congress intended to expand Section 1546 to reach any "other document" which then, or in the future, was designated as "required for entry into the United States." Thus, the inclusion of alien registration receipt cards within that Section is wholly consistent with the legislative purpose, since Congress created in Section 1546 a category of documents, the knowing possession of which, if known to be altered or counterfeited, it meant to proscribe (see n. 5, *supra*).

¹⁰ Respondent was indicted for having "knowingly and intentionally possessed a falsely made, altered, forged and counterfeited alien registration receipt card" with knowledge that the same "was falsely made, altered, forged and counterfeited; in violation of Title 18, United States Code, Section 1546" (App. 7-8).

struction of this provision in the manner urged by respondent would thus have the undesirable and unintended effect of insulating from punishment the conduct of altering alien registration receipt cards, or of knowingly possessing such cards with knowledge that they had been altered or counterfeited.

Such activity is not punished under any other provision of the 1952 Act. Section 1325 of Title 8, United States Code, on which respondent places heavy reliance (Resp. Br. 28-29), reaches an entirely different offense. It provides that "Any alien who *** (3) *obtains entry* to the United States by a wilfully false or misleading representation or the wilful concealment of a material fact" shall be guilty of a misdemeanor (emphasis added).¹¹ It is aimed at actual, rather than potential, misuse of the entry document. It therefore does not follow from the fact that counterfeiting of alien registration receipt cards may be punished under either Section 266(d) or Section 1546 that Congress meant to exclude such cards entirely from the proscription in the latter provision.¹²

¹¹ Curiously, respondent concedes that use of the term "entry" in this provision *includes* aliens seeking to reenter the United States (Resp. Br. 29), despite his argument that the same term in a similar context under a separate provision of the same Act must be read so as to *exclude* from coverage those seeking reentry.

¹² It is conceded that the alien registration receipt card is a document on which an alien may be permitted to enter the United States (Resp. Br. 29). *Lau Ow Bew v. United States*, 144 U.S. 47, relied on by respondent, is thus not in point. That case dealt not with the statute involved here, but with the Chinese Exclusion Act of 1882. The Court held that that Act, which required a certificate from the Chinese government on

II. THE IMMIGRATION AND NATURALIZATION SERVICE FILE OF ANOTHER ALIEN, WHOSE REGISTRATION RECEIPT CARD WAS THE ONE THAT RESPONDENT POSSESSED, WAS PROPERLY ADMITTED INTO EVIDENCE

The district court allowed, over respondent's objection, the introduction of the Immigration and Naturalization Service file of one Diana Vargas-Garcia, which contained a copy of her application, on an official form, for a new alien registration receipt card. The application indicated that her card had been stolen with her purse in Mexico around January 12, 1968 (App. 120). It was this card that was found in

behalf of Chinese persons about to come to the United States, did not apply to a Chinese merchant who had long been a resident of this country and who had left it temporarily with the intent to return. Petitioner also relies on *McFarland v. United States*, 19 F. 2d 807 (C.A. 6). That case concerned a separate provision of the Immigration Act of 1924, dealing with "false personation." The court held that a statute punishing an individual who "on applying for an immigration visa or permit, or for admission to the United States, personates another" did not apply to an alien who presented another's citizenship papers, since the intent of Congress was to reach only acts of personation involving the specified kinds of documents (i.e., visas or permits). The decision, however, disregards the statutory phrase, "or for admission to the United States." The court in *Mouyas, supra*, expressly rejected *McFarland* in upholding a conviction under the same statute (now paragraph 3 of Section 1546) involving a fraudulent passport. *Mouyas* was referred to with apparent approval in the Senate Report antedating passage of the 1952 Act. See S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 647-648.

Finally, for the reasons discussed above, the court of appeals in this case properly declined to follow the opinion of Judge Igoe in *United States v. Fernandez-Gonzales* (Resp. Br. App. 1a-6a), dismissing an indictment under Section 1546 for essentially the same reasons advanced here by respondent.

respondent's possession in altered form, giving rise to the present prosecution.

Respondent argued at trial, as he does here, that the application of Miss Vargas-Garcia for a new card was hearsay and that its introduction violated his right to confrontation under the Sixth Amendment.¹³ His objection was overruled upon a showing by the government that the file had been certified by the district director, who is empowered (see 8 U.S.C. 1103; 8 C.F.R. 103.7) to certify any official record as a true copy (App. 110-112).

The admission of the file was proper. It has long been established that official government records, when properly authenticated as here,¹⁴ are admissible as an exception to the hearsay rule. See 28 U.S.C. 1733; Rule 44(a), Fed. R. Civ. P.; Rule 27, Fed. R. Crim. P. Numerous decisions hold that the admission of such records in a criminal case does not infringe the right of confrontation. See e.g., *United States v. Sacco*, 428 F. 2d 264, 271-272 (C.A. 9), certiorari denied, 400 U.S. 903 (I.N.S. records); *United States v. Lloyd*, 431 F. 2d 160, 163-164 (C.A. 9), certiorari denied, 403 U.S. 911 (Selective Service file); *United States v. Holmes*, 387 F. 2d 781, 783-784 (C.A. 7), certiorari denied, 391 U.S. 936 (Selective Service file); see also

¹³ This argument, and the remaining arguments discussed *infra*, were made to the court of appeals, but that court found it unnecessary to pass on these contentions.

¹⁴ The certification by the district director was sufficient for authentication; there is no necessity to call a government official as a witness to identify a certified I.N.S. document. See *Maroon v. Immigration and Naturalization Service*, 364 F. 2d 982, 987 (C.A. 8):

United States v. Leathers, 135 F. 2d 507, 511 (C.A. 2) (business records); *Dutton v. Evans*, 400 U.S. 74, 96 (Harlan, J., concurring).

The fact that the application questioned here was completed by a private individual rather than by a government officer or agency does not affect the admissibility of the document. Many government agencies by law authorize or require private persons to furnish them with information which is then retained, as an official government or business record, in that person's file. Such was the function of the application form completed by Diana Vargas-Garcia, since, under 8 C.F.R. 264.1(c), any alien who loses his evidence of registration must promptly apply for a new card. Thus, the very nature of the application in this context carried a substantial guarantee of trustworthiness about the information it contained. See *Dutton v. Evans*, 400 U.S. 74; *Kay v. United States*, 255 F. 2d 476, 480-481 (C.A. 4).

Moreover, the application of Miss Vargas-Garcia was expressly offered, not to prove the truth of her statements contained therein, but merely to show that the Service had in fact received from her a request for a new card (App. 112). The agents testified that the card in respondent's possession appeared to have been altered. The Immigration file of Miss Vargas-Garcia was thus significant for the purpose of showing that an alien, whose registration number was identical to the number on the card respondent possessed, had applied for a new card. From this, the trial judge could properly conclude, without regard to the truth

of Miss Vargas-Garcia's statement that her card had been stolen, that the card in respondent's possession had originally been issued to Diana Vargas-Garcia and had subsequently been altered.

III. RESPONDENT'S PRODUCTION OF HIS ALIEN REGISTRATION RECEIPT CARD ON REQUEST DID NOT CONSTITUTE AN UNREASONABLE SEIZURE OF EVIDENCE IN VIOLATION OF THE FOURTH AMENDMENT.

Respondent also seeks to establish a Fourth Amendment violation in this case, based on the action of investigator Burrow in asking to see respondent's alien registration receipt card on his second visit to the apartment. The argument apparently is that the agent, in making such a request, exceeded the scope of consent given him by the arrested prisoner Rodriguez-Ortiz (a co-tenant with respondent) to enter the apartment.

But, even if it could be shown that no consent had been given by Rodriguez-Ortiz to permit the agents' entry—an assumption at odds with the agents' sworn testimony¹⁵—a simple request to see respondent's alien registration receipt card, which is authorized

¹⁵Investigator White, who accompanied Burrow and Rodriguez-Ortiz to the apartment, testified that Rodriguez-Ortiz "was returning at his request to get his clothing and personal possessions" (App. 57). Although Rodriguez-Ortiz did not expressly invite the agents into the apartment, it was he who led them to the door and then opened it with a key, whereupon they "all went in together" (App. 57, 59). Clearly, there was implicit consent for the agents to enter the dwelling.

by statute (8 U.S.C. 1357(a)), would not have infringed on any constitutional rights of respondent. Since Rodriguez-Ortiz was in custody, the agents had a right to accompany him while he gathered his belongings. Once inside, they were not required to ignore respondent or to abstain from requesting him to produce his alien registration receipt card. Moreover, his decision to produce the card required an intervening act of volition and will on his part, thus removing whatever link might have existed between the allegedly illegal entry and what respondents characterize as a "search." The agents' presence in the apartment in these circumstances, while a "but for" condition to their request to see the card, did not effectively cause him to produce it. See *Wong Sun v. United States*, 371 U.S. 471, 487-488, 491; *Brown v. United States*, 375 F. 2d 310 (C.A.D.C.), certiorari denied, 388 U.S. 915; *Smith and Bowden v. United States*, 324 F. 2d 879, 881 (C.A.D.C.), certiorari denied, 377 U.S. 954.

Bumper v. North Carolina, 391 U.S. 543, relied on by respondent, is not in point. That case held invalid a purported consent given in response to an *assertion* of legal authority by police to search (*i.e.*, a warrant). Here there was no such assertion. If, as we have argued in our opening brief, the agents had a right to request the card, compliance with that request cannot, in the circumstances of this case, be deemed involuntary. See *Davis v. United States*, 328 U.S. 582; *United States v. Montez-Hernandez*, 291 F. Supp. 712 (E.D. Cal.).

IV. THERE WAS NO VIOLATION OF DUE PROCESS RESULTING FROM THE INABILITY OF RESPONDENT TO INTERVIEW WITNESSES WHO HAD BEEN DEPORTED

Respondent's final contention is that he was deprived of due process of law by the denial of his pre-trial motion for an opportunity, at government expense, to try to locate Miguel Rico (App. 35). He further claims that, because of allegedly improper delay in appointing counsel for him, his attorney was unable to interview Rodriguez-Ortiz before the latter had been deported (Resp. Br. 33-34). Both arguments warrant little attention.

1. Respondent has never satisfactorily indicated in what respect the testimony of either witness would have been material.¹⁶ Compare Rule 17(b), Fed. R. Crim. P. With respect to Rico, the trial judge was not required, absent some showing of materiality, to authorize funds to try to locate a person in a foreign country. Cf. *United States v. Wolfson*, 322 F. Supp. 798, 819 (D. Del.).

2. As for the claim of improper delay, the record shows that Rico, Rodriguez-Ortiz and respondent were arrested on November 18, 1968. Deportation proceedings against respondent were commenced on November 20, and concluded the following day in an order of deportation. A federal grand jury indicted respondent

¹⁶ Respondent apparently desired the witnesses to testify on the issue whether the agents had entered the apartment on the second occasion with consent (Resp. Br. 33-34). Since Rico remained in the car with agent Jacobs at the time of the second

and Rodriguez-Ortiz on December 5, 1968.¹⁷ Both cases were set for arraignment on December 12, 1968. On that day, Rodriguez-Ortiz entered a plea of guilty before Judge Hoffman, who sentenced him to probation in lieu of a prison term on condition that he be immediately returned to Mexico and make no future illegal entry into the United States. Respondent's arraignment before Judge Lynch was continued to December 16, 1968, due to the illness of the judge. On that date, Judge Lynch appointed respondent's present counsel to represent him and respondent entered a plea of not guilty.

Respondent argues that, had counsel been appointed before December 12, he would have had an opportunity to talk to Rodriguez-Ortiz; the failure to bring him before a United States Commissioner (App. 72), he contends, resulted in the delay in appointment of counsel and was prejudicial. There was, however, no need to bring respondent before a Commissioner prior to December 5, 1968, since he was not then being held on a criminal charge, but rather was being detained by virtue of a civil deportation order. Thereafter, it is clear that there was no purposeful

visit to the apartment, it is difficult to see what light he could shed on this issue. In any event, as we have already indicated, the question of "consent" is not relevant, in the circumstances of this case, to the voluntariness of respondent's production of the alien registration receipt card. Moreover, there is no reason to believe that the aliens' testimony would have been favorable to respondent.

¹⁷ Rico was deported and not indicted.

delay by the government in bringing respondent before the judge for arraignment or in having counsel appointed. There is thus no cause for reversal of the conviction. See *United States v. Perlman*, 430 F. 2d 22, 25-26 (C.A. 7), certiorari denied, 400 U.S. 832.¹⁸

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of conviction reinstated.

ERWIN N. GRISWOLD,

Solicitor General.

WILL WILSON,

Assistant Attorney General.

WM. BRADFORD REYNOLDS,

Assistant to the Solicitor General.

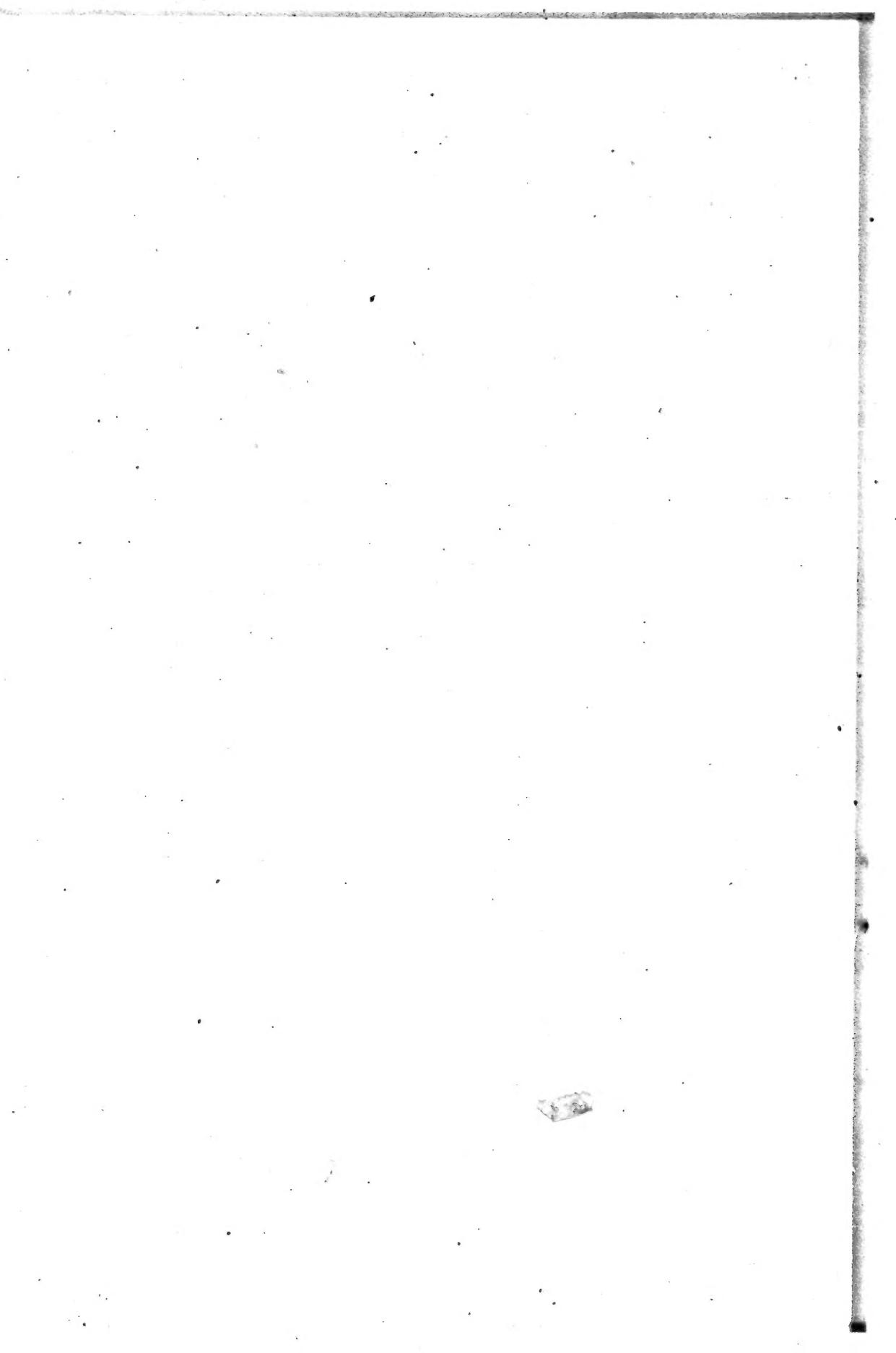
BEATRICE ROSENBERG,

ROGER A. PAULEY,

Attorneys.

OCTOBER 1971.

¹⁸ In *Perlman*, the government paroled and then deported an alien co-defendant of the accused who was the sole direct participant in an alleged illegal marihuana scheme and who had previously pleaded guilty. Finding that the prosecutor had not taken part in the decisions which caused the removal of the potential witness from the country, the court concluded that since there was no deliberate attempt by the government to suppress evidence and no reason to believe the witness' testimony would have been favorable to the accused, no violation of constitutional rights had occurred. The present case follows *a fortiori* from *Perlman* because the materiality of the testimony of Rico and Ortiz to the offense charged here is wholly speculative, whereas in *Perlman* the potential witness "obviously possessed evidence regarding Perlman's participation in the illegal scheme" (430 F. 2d at 25).



Syllabus

UNITED STATES *v.* CAMPOS-SERRANOCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

No. 70-46. Argued October 14, 1971—Decided December 20, 1971

Possession of counterfeit alien registration receipt card *held* not an act punishable under 18 U. S. C. § 1546, which prohibits, *inter alia*, the counterfeiting or alteration of, or the possession, use, or receipt of an already counterfeited or altered "immigrant or non-immigrant visa, permit, or other document required for entry into the United States." The primary purpose of an alien registration receipt card is for identification within the United States, and its merely permissible re-entry function under an Immigration and Naturalization Service regulation does not suffice to bring the card within the coverage of the statute. There is a separate statutory provision specifically protecting the integrity of alien registration receipt cards, indicating that the Congress did not intend them to be covered by the more general language of § 1546. Pp. 295-301. 430 F. 2d 173, affirmed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 301.

William Bradford Reynolds argued the cause for the United States *pro hac vice*. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and Roger A. Pauley*.

John J. Cleary, by appointment of the Court, 401 U. S. 990, argued the cause and filed a brief for respondent.

William J. Scott, Attorney General, *Joel M. Flaum*, First Assistant Attorney General, and *James B. Zagel* and *Jayne A. Carr*, Assistant Attorneys General, filed a brief for the State of Illinois as *amicus curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent was convicted in a federal district court for possession of a counterfeit alien registration receipt card in violation of 18 U. S. C. §1546,¹ and sentenced to a three-year prison term.² The Court

¹ The applicable portion of § 1546 reads as follows:

"Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained

"Shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

² The sentence was suspended, and the respondent was placed on probation for three years "on condition that he return to Mexico and not return to the United States illegally." Pursuant to this sentence, he was remanded to the custody of the Immigration and Naturalization Service for deportation under a previous order. It appears that he is now in Mexico. Clearly, the fact that the respondent is now out of the country does not render this case moot. He is still under the sentence of the District Court and on probation subject to conditions imposed by the District Court. Should he violate those conditions, he will be subject to imprisonment under his continuing criminal sentence.

Eisler v. United States, 338 U. S. 189, is irrelevant to this case. There, the petitioner fled voluntarily from the United States and successfully resisted extradition. We, therefore, declined to consider the merits of his case, just as we have declined over the years to consider the merits of criminal cases in which the party seeking review has escaped "from the restraints placed upon him pursuant to the conviction." *Molinaro v. New Jersey*, 396 U. S. 365, 366; *Bonahan v. Nebraska*, 125 U. S. 692; *Smith v. United States*, 94 U. S. 97. "While such an escape does not strip the case of its character as an adjudiciable case or controversy, we believe it disentitles [the party] to call upon the resources of the

of Appeals reversed the conviction, 430 F. 2d 173, holding that because of the circumstances under which Government agents had acquired the card from the respondent, it had been unconstitutionally admitted against him at the trial under *Miranda v. Arizona*, 384 U. S. 436. We granted certiorari. 401 U. S. 936. We do not reach the constitutional issue, however, for we have concluded that the judgment of the Court of Appeals must be affirmed upon a discrete statutory ground. See *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347 (Brandeis, J., concurring).³ We hold that possession of a counterfeit alien registration receipt card is not an act punishable under 18 U. S. C. § 1546.⁴

The statutory provision in question prohibits, *inter alia*, the counterfeiting or alteration of, or the possession, use, or receipt of an already counterfeited or altered "immigrant or nonimmigrant visa, permit, or other document required for entry into the United States." This offense originated in Section 22 (a) of the Immigration Act of 1924,⁵ which covered only an "immigration visa or permit." The words "other document required for entry into the United States," were added in 1952 as part of the Immigration and Nationality Act. § 402 (a), 66 Stat. 275. The legislative history of the

Court for determination of his claims." *Molinaro v. New Jersey*, *supra*, at 366. In the present case, by contrast, the respondent has not fled from the restraints imposed by the District Court pursuant to this conviction. Rather, he is living under those restraints today.

³ "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."

⁴ Accord, *United States v. Fernandez-Gonzalez* (64 CR 101, ND Ill.) (unpublished opinion). Contrary to the suggestion in the dissenting opinion, our decision on this issue of statutory construction will hardly come as a "surprise" to the parties. The issue was presented to and decided by the Court of Appeals. It was argued and fully briefed before this Court by both parties.

⁵ 43 Stat. 165.

1952 Act, however, does not make clear which "other" entry documents the Congress had in mind.⁶

Alien registration receipt cards were first issued in 1941. They are small, simple cards containing the alien's picture and basic identification information.⁷ They have no function whatsoever in facilitating the initial entry into the United States. Rather, they are issued *after* an alien has entered the country and taken up residence. Their essential purpose is to effectuate the registration requirement for all resident aliens established in the Alien Registration Act of 1940.⁸

Until 1952, alien registration receipt cards could not even be used to facilitate *re-entry* into the United States by a resident alien who had left temporarily. Such an alien was required to obtain special documents authorizing his re-entry into the country, such as a visa or a re-entry permit.⁹ However, in 1952—less than a month

⁶ See H. R. Rep. No. 1365, 82d Cong., 2d Sess.; S. Rep. No. 1137, 82d Cong., 2d Sess.; H. R. Conf. Rep. No. 2096, 82d Cong., 2d Sess. The only one of these reports to make *any* mention whatsoever of the changes in § 1546 was H. R. Rep. No. 1365. It simply stated that "necessary amendments [are made] to other laws Most of those amendments are in the nature of conforming changes." *Id.*, at 88. It seems most likely that the purpose of the new language in § 1546 was to reach the specialized border crossing identification cards, authorized as a substitute for a visa or a permit in the Alien Registration Act of 1940. See n. 9 and n. 12, *infra*. At the time H. R. Rep. No. 1365 was published, the alien registration receipt card had no "entry" or "re-entry" function.

⁷ The Appendix filed by the Government in this case contains a reproduction of an alien registration receipt card, Form I-151 of the Immigration and Naturalization Service.

⁸ See 54 Stat. 673. The statutory provisions for the registration of aliens are now contained in 8 U. S. C. §§ 1301-1306.

⁹ Provision for the use of re-entry permits was made in the Immigration Act of 1924. § 10, 43 Stat. 158. The Alien Registration Act of 1940 required that an alien present one of three special documents—a visa, a re-entry permit, or a border crossing identification card—in order to come into the United States. 54 Stat. 673.

before final enactment of the Immigration and Nationality Act—the Immigration and Naturalization Service promulgated a regulation that allowed resident aliens to use their registration receipt cards for re-entry purposes as a permissible substitute for the specialized documents.¹⁰ The apparent reason for this regulation was to minimize paper work and streamline administrative procedures by giving resident aliens the option of using for re-entry a document already issued and serving other purposes. Thus, the registration receipt cards may now be used in lieu of a visa or a re-entry permit on condition that the holder is returning to the United States after a temporary absence of not more than one year.¹¹

The Court of Appeals held that the limited, merely permissible, re-entry function of the alien registration receipt card is sufficient to make it a "document required for entry into the United States" under § 1546. 430 F. 2d, at 175. We cannot agree. It has long been settled that "penal statutes are to be construed strictly," *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U. S. 284, 296, and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it," *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 362. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221-222. In § 1546,

¹⁰ The 1952 INS regulation provided that the alien registration receipt card could be used as a permissible substitute for a visa or a re-entry permit in effecting a re-entry into this country from a contiguous country. 17 Fed. Reg. 4921. In 1957, this permissible use of the alien registration receipt card was expanded to include re-entry from noncontiguous nations. 22 Fed. Reg. 6377. The present INS regulation appears in 8 CFR § 211.1 (b).

¹¹ 8 CFR § 211.1 (b).

Congress did speak in "clear and definite" language. But, taken literally and given its plain and ordinary meaning, that language does not impose a criminal penalty for possession of a counterfeited alien registration receipt card. Alien registration receipt cards *may* be used for *re-entry* by certain persons into the United States. They are not *required* for *entry*.

The canon of strict construction of criminal statutes, of course, "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States v. Bramblett*, 348 U. S. 503, 510. If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered. In this spirit, we read § 1546 in conjunction with 8 U. S. C. § 1101 (a)(13)—another part of the 1952 Immigration and Nationality Act—which provides that, under most circumstances, an "entry" into the United States is defined to include a "re-entry." We have held in the past that Congress did not intend these terms to be taken entirely synonymously. *Rosenberg v. Fleuti*, 374 U. S. 449. But Congress clearly did intend a significant overlap, and we cannot say that a document usable for "entry" into the United States under § 1546 does not include some documents usable for "re-entry." Nor do we hold that § 1546 applies only to those documents absolutely "required" in order to enter or re-enter the country. To do so would undermine the congressional purpose behind § 1546, since the Immigration and Naturalization Service has not required that presentation of any one particular document be the exclusive condition of crossing our borders.

While the apparent congressional purpose underlying § 1546 would thus seem to bar an uncompromisingly literal construction, the precise language of the provision

must not be deprived of all force. The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute. Accordingly, a "document required for entry into the United States" cannot be construed to include any document whatsoever which the Immigration and Naturalization Service, from time to time, decides may be presented for re-entry at the border. The language of § 1546 denotes a very special class of "entry" documents—documents whose primary *raison d'être* is the facilitation of entry into the country. The phrase, "required for entry into the United States," is descriptive of the nature of the documents; it is not simply an open-ended reference to future administrative regulations.

If, for example, the Immigration and Naturalization Service were to allow the presentation of identification such as a driver's license at the border, the nature of such a license would not suddenly change so that it would fall into the category of a "document required for entry into the United States" under § 1546. To be sure, if a counterfeit driver's license were presented to secure entry or re-entry into the country, the bearer could be prosecuted under 8 U. S. C. § 1325, which provides for the punishment of "[a]ny alien who . . . obtains entry to the United States by a willfully false or misleading representation . . ." But mere possession of a counterfeit driver's license, far from the border, could not be prosecuted under § 1546. The reason is that a driver's license is not essentially an "entry" document. Rather, its primary purpose is to allow its bearer lawfully to drive a car, and the bearer's possession of a counterfeit license, far from the border, could not be assumed to be related to the policies underlying the 1952 Immigration and Nationality Act.

The same analysis applies to the alien registration receipt card. Its essential purpose is not to secure entry

into the United States, but to identify the bearer as a lawfully registered alien residing in the United States. It is issued to an alien *after* he has taken up residence in this country. It is intended to govern his activities and presence *within* this country. The card has been given a convenient, additional function as a permissible substitute for a visa or re-entry permit in facilitating re-entry into the United States by a resident alien. But, unlike a visa or a re-entry permit,¹² an alien registration receipt card serves this function in only a secondary way. Unlike a visa or a re-entry permit, it is not, by its nature, a "document required for entry into the United States" under § 1546.

This construction of the language of § 1546 is conclusively supported by that section's statutory context. In the 1952 Immigration and Nationality Act, Congress clearly regarded alien registration receipt cards as serving policies separate and distinct from those served by pure "entry" documents. Although, in 1952, those cards could be used as substitutes for visas or re-entry permits, the Congress chose to deal with them separately. In 8 U. S. C. § 1306 (c) and § 1306 (d), it specifically provided for the punishment of one "who procures or attempts to procure registration of himself or another person through fraud" and of one who counterfeits an alien registration receipt card. The fact that the Con-

¹² Visas and re-entry permits are the specialized "entry" documents for which the alien registration receipt card is a permissible substitute under present INS regulations. See n. 10, *supra*.

Border crossing identification cards are like visas and re-entry permits, and unlike alien registration receipt cards, in that they are specialized documents whose sole purpose and function is to regulate the crossing of our national borders. Hence, the likelihood that Congress in 1952 wished to expand the coverage of § 1546 to reach border crossing identification cards, see n. 6, *supra*, supports our holding. The expansion mandated by Congress was simply *within* the class of specialized "entry" documents.

gress did not rely on § 1546 to ensure the integrity of alien registration receipt cards indicates that it did not believe that they were covered by that section. Moreover, there is a very specific overlap between § 1546 and § 1306. Both sections explicitly prohibit counterfeiting, and both explicitly prohibit fraud in the acquisition of documents.¹³ Unless we assume that § 1306 is mere surplusage, we must conclude that § 1546 covers only specialized "entry" documents, and not alien registration receipt cards specifically covered in § 1306.¹⁴

For these reasons the judgment is

Affirmed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

The Court today affirms the judgment of the Court of Appeals "upon a discrete statutory ground" and does

¹³ The prohibition of counterfeiting in § 1546 is contained in the first paragraph of that section. See n. 1, *supra*. The prohibition of fraud in the acquisition of documents is contained in the third paragraph of § 1546, which reads as follows:

"Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity

"Shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

¹⁴ "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Market Co. v. Hoffman*, 101 U. S. 112, 115-116. See *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307-308. To be sure, the overlap between § 1546 and § 1306 is only partial, since § 1546 goes farther than § 1306—prohibiting the possession of counterfeit documents as well as the counterfeiting of documents. But the Congress would hardly have thought it necessary to create any overlap at all, if it had believed alien registration receipt cards were covered by § 1546.

not reach the questions with respect to which certiorari was granted.¹ This statutory ground was rejected by the District Court when it denied a defense motion to dismiss the indictment. It was also rejected by the Court of Appeals. 430 F. 2d 173, 175-176. I would reject it here.

The statutory issue to which the Court retreats is whether an alien registration card is a "document required for entry into the United States," within the meaning of 18 U. S. C. § 1546. The Court holds, somewhat to the surprise of the litigants I am sure, that the card is not such a document, and that Campos-Serrano's indictment, therefore, charged no offense under the statute. I feel that this conclusion has no support either in the statutory language and meaning or in the legislative history, and is certainly not supported by the practice, long in effect, at our Nation's borders.

I

The parent of § 1546 is § 22 (a) of the Immigration Act of 1924. 43 Stat. 165. That statute did not refer to "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States," as § 1546 does today. Instead, it spoke only of "any immigrant visa or permit." Nevertheless, even under the definition of "permit" in this older and narrower statute, Congress specifically included a temporary re-entry paper issued to and used by a resident alien who wished to

¹ "1. Whether the court below unduly extended *Miranda v. Arizona*, 384 U. S. 436, by holding, on the facts of this case, that agents of the Immigration and Naturalization Service were required to give respondent warnings before asking him to produce his alien registration card.

"2. Whether an alien registration card is a 'required record' which an alien must produce upon request irrespective of whether he is 'in custody.'" Petition for certiorari 2.

leave the country for a period of less than one year.² Clearly, therefore, the statutory scheme, as far back as 1924, contemplated that knowing possession of an altered document useful only for *re-entering* the United States was punishable as a felony.

The registration-card came into being with Title III of the Alien Registration Act of 1940. 54 Stat. 673. At first it served only for identification of the alien who had complied with the registration requirements. Section 30 of the 1940 Act, however, authorized the use of a separate "border-crossing identification card" by a resident alien in order to enable him to return to the United States after temporary travel to a contiguous country.

An INS regulation filed May 29, 1952, provided that a registration card, issued on or after September 10, 1946, "shall constitute a resident alien's border crossing card" and could be used by the alien in effecting re-entry into the United States provided he had not visited any foreign territory other than Canada or Mexico. 17 Fed. Reg. 4921-4922. This was the first time a registration card, as such, was recognized as a re-entry document. But it was so recognized. Five years later its use was expanded with respect to re-entry from nations that were not contiguous. 22 Fed. Reg. 6377 (1957). Its use for this purpose has continued to the present time. 8 CFR § 211.1 (b) (1971).

In addition to this administrative practice, the statutory language itself was expanded. Section 22 (a) of the 1924 Act was repealed in 1948 and simultaneously re-enacted without significant change as 18 U. S. C. § 1546 and as part of that year's general recodification of the federal criminal laws. 62 Stat. 771, 865. Finally, § 1546 was amended to its present form by § 402 (a) of the Immigration and Nationality Act of 1952. 66 Stat. 275.

² Sections 28 (k) and 10 of the 1924 Act, 43 Stat. 169 and 158.

There is no room for dispute that the 1952 change served to broaden, not to contract, the number of documents within the prohibition of § 1546. The 1924 reference to "any immigration visa or permit" is obviously but a lesser part of the later and still current phrase, "any immigrant or nonimmigrant visa, permit, or other document required for entry." See *United States v. Rodriguez*, 182 F. Supp. 479, 484 n. 3 (SD Cal. 1960), reversed in part on other grounds, *sub nom. Rocha v. United States*, 288 F. 2d 545 (CA9), cert. denied, 366 U. S. 948 (1961). From 1924 until the 1952 legislation, narrower statutory language nevertheless had covered a document used solely for re-entry. Surely nothing in the expanded language of 1952 suggests congressional intent thenceforth to confine the statute to initial-entry documents. Indeed, congressional intent to the contrary, that is, to enlarge the coverage of § 1546, is evident not only from the statute's words but, as well, from the definition of "entry" in the 1952 Act, § 101 (a)(13), 66 Stat. 167, 8 U. S. C. § 1101 (a)(13):

"The term 'entry' means *any coming of an alien* into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise, except" (Emphasis supplied.)

From this it inevitably follows that the phrase "document required for entry" embraces a document used for re-entry into the United States. One document of that kind is the alien registration card.³

This brief but clear administrative and legislative history, it seems to me, reveals and proves the intent of

³ The face of the card, Form I-151, bears the recital, "This card will be honored in lieu of a visa and passport on condition that the rightful holder is returning to the United States after a temporary absence of not more than one year and is not subject to exclusion under any provision of the immigration laws."

Congress and the meaning and reach of the statute. The alien registration card, Form I-151, became one of a number of documents specified and accepted and *required* for re-entry.

The Court's opinion, as I read it, seems to accept most of all this, that is, that there is no § 1546 distinction between "entry" and "re-entry," and that an alien registration card is a document "required" for entry into the United States. *Ante*, at 298.

Having made this broad and, to me, sensible reading of § 1546, the Court, however, then reverses direction and conveniently restricts § 1546 to "a very special class of 'entry' documents—documents whose primary *raison d'être* is the facilitation of entry into the country," and it accuses the INS of standing to gain "an open-ended reference to future administrative regulations" if the Government were to prevail here. The reasons for this change of direction are not apparent to me. The Court's comparison of the registration card to a driver's license in this context is wide of the mark. A driver's license has nothing to do with immigration. A registration card has everything to do with immigration. It is authorized under the immigration statutes. It is required of a resident alien. 8 U. S. C. §§ 1301-1306. And for almost two decades it has been a re-entry document.

II

The fact that there may be some overlapping between § 1546 and 8 U. S. C. § 1306 (d) does not prevent the application of § 1546 to the alien registration card.⁴ Section 1306 (d) came into being as § 266 (d) of the 1952

⁴ Overlapping in federal criminal statutes is not unknown. See, for example, *Sansone v. United States*, 380 U. S. 343 (1965); *Gore v. United States*, 357 U. S. 386 (1958); *Achilli v. United States*, 353 U. S. 373 (1957); *Prince v. United States*, 352 U. S. 322 (1957); *Spies v. United States*, 317 U. S. 492 (1943).

Act, 66 Stat. 226. It does refer specifically to "an alien registration receipt card," whereas, § 1546 has no such specific reference. The two sections, however, have different purposes and relate to different aspects of immigration. Section 266 (d) was a part of the Act's chapter that concerned "Registration of Aliens." It has to do with the implementation and protection of the alien registration scheme. It reached counterfeiting alone. Section 1546, on the other hand, is concerned with entry into the country and with the integrity of documents used in effecting entry. It is not restricted to counterfeiting. It also reaches knowing possession and alteration.

The Court's exclusion of the alien registration card from the reach of § 1546 leaves entirely free from punishment the alteration of a card and the possession of a card with knowledge of its altered or counterfeit character. Surely Congress did not intend to leave that loophole.⁵

I therefore dissent from the Court's affirmance of the judgment of the Court of Appeals upon the "discrete statutory ground." I would decide that issue as the Court of Appeals decided it and I would go on to reach the questions we anticipated when we granted the petition for certiorari.

⁵ The loophole is not closed by 8 U. S. C. § 1325, as the respondent would assert. Section 1325 concerns a very different offense, namely, the actual misuse of the entry document in obtaining entry to the United States. Section 1546, on the other hand, relates to potential misuse of the entry document after gaining entry to the country.

